

EDITOR'S NOTE

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<p>No. 86-357-CFX Status: GRANTED</p> <p>Docketed: August 30, 1986</p>	<p>Title: Burlington Northern Railroad Company, Petitioner v. Oklahoma Tax Commission, et al.</p> <p>Court: United States Court of Appeals for the Tenth Circuit</p> <p>Counsel for petitioner: Christian, Betty Jo</p> <p>Counsel for respondent: Cox, Donna E., Henry, Robert H.</p>
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Entry	Date	Note	Proceedings and Orders
1	Jul 11 1986		Application for extension of time to file petition and order granting same until August 30, 1986 (White, July 14, 1986).
2	Aug 30 1986	G	Petition for writ of certiorari filed.
3	Aug 30 1986		Appendix of petitioner Burlington No. RR Co. filed.
4	Sep 29 1986		Brief amicus curiae of United States filed.
5	Oct 1 1986		DISTRIBUTED. October 17, 1986
6	Oct 2 1986	G	Motion of Association of American Railroads for leave to file a brief as amicus curiae filed.
7	Oct 2 1986	X	Brief of respondents OK Tax Commission, et al. in opposition filed.
9	Oct 20 1986		Motion of Association of American Railroads for leave to file a brief as amicus curiae GRANTED.
10	Oct 20 1986		Petition GRANTED.
11	Nov 22 1986		Record filed.
12	Nov 22 1986		Certified copy of C. A. proceedings received.
14	Nov 21 1986		Order extending time to file brief of petitioner on the merits until December 12, 1986.
15	Dec 12 1986	G	Motion of Association of American Railroads for leave to file a brief as amicus curiae filed.
16	Dec 11 1986	G	Motion of American Bus Association for leave to file a brief as amicus curiae filed.
17	Dec 12 1986		Joint appendix filed.
18	Dec 12 1986		Brief of petitioner Burlington No. RR Co. filed.
19	Dec 12 1986		Record filed.
20	Dec 12 1986		Brief amicus curiae of United States filed.
21	Dec 23 1986	G	Motion of The Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
23	Jan 5 1987		Order extending time to file brief of respondent on the merits until January 25, 1987.
24	Jan 12 1987		Motion of Association of American Railroads for leave to file a brief as amicus curiae GRANTED.
25	Jan 12 1987		Motion of American Bus Association for leave to file a brief as amicus curiae GRANTED.
26	Jan 12 1987		Motion of The Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
27	Jan 28 1987		Brief amicus curiae of Kansas, et al. filed.

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Entry	Date	Note	Proceedings and Orders
28	Jan 28 1987	Brief amicus curiae of California, et al. filed.	
30	Jan 28 1987	Brief amicus curiae of Fifty CA Counties filed.	
31	Jan 28 1987	Brief amicus curiae of respondents OK Tax Commission, et al. filed.	
32	Jan 28 1987	Brief of respondents State Bd. of Equalization, et al. filed.	
33	Feb 5 1987	Application of respondents' for leave to file their brief on the merits in excess of the page limitation filed	
34	Feb 5 1987	(A-573), and order granting same by White, J., on Feb. 9, 1987. The brief may not exceed 52 pages.	
35	Feb 6 1987	SET FOR ARGUMENT. Wednesday, March 25, 1987. (1st case)	
36	Feb 10 1987	CIRCULATED.	
37	Mar 9 1987	X Reply brief of petitioner Burlington No. RR Co. filed.	
38	Mar 25 1987	ARGUED.	



36 - 337 (1)

No. \_\_\_\_\_

Supreme Court, U.S.

FILED

AUG 30 1986

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Petitioner,*

v.

OKLAHOMA TAX COMMISSION, *et al.*,  
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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August 30, 1986

## QUESTIONS PRESENTED

I. The principal question presented is whether the Tenth Circuit erred in holding that section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, which prohibits discriminatory state taxation of railroads, does not reach discrimination resulting from overvaluation of railroad property unless the railroad can, before trial, make a "strong showing" of "purposeful overvaluation . . . with discriminatory intent."

II. A secondary question presented is whether the lower courts erred in dismissing Burlington Northern's complaint without an evidentiary hearing where the railroad proffered substantial evidence of purposeful overvaluation with discriminatory intent.

**LIST OF CORPORATE SUBSIDIARIES  
AND AFFILIATES**

**Burlington Northern Railroad Company:**

The Belt Railway Company of Chicago  
 Camas Prairie Railroad Company  
 Davenport, Rock Island and North Western Railway  
 Company  
 The Denver Union Terminal Railway Company  
 Houston Belt & Terminal Railway Company  
 Iowa Transfer Railway Company  
 Kansas City Terminal Railway Company  
 Keokuk Union Depot Company  
 The Lake Superior Terminal and Transfer Railway  
 Company  
 Longview Switching Company  
 The Minnesota Transfer Railroad Company  
 Paducah & Illinois Railroad Company  
 Portland Terminal Railroad Company  
 The Saint Paul Union Depot Company  
 Terminal Railroad Association of St. Louis  
 Trailer Train Company  
 The Wichita Union Terminal Railway Company  
 Winona Bridge Railway Company

**The El Paso Company:**

**El Paso Natural Gas Company:**

**El Paso Development Company:**

**Lake Country Windjammer, Inc.:**

Adams Canyon Ranch  
 Santa Paula Farms

**El Paso Hydrocarbons Company:**

Minera San Pedro Corralitos, S.A.

**Meridian Oil Holdings Inc.:**

Meridian Oil Inc. (formerly Milestone  
 Petroleum Inc.):

Butte Pipe Line Company  
 Portal Pipe Line Company

**New Mexico and Arizona Land Company:**

NZ Development Corp.  
 NZ Properties, Inc.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

\_\_\_\_\_  
No. \_\_\_\_\_  
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BURLINGTON NORTHERN RAILROAD COMPANY,  
*Petitioner,*

v.

OKLAHOMA TAX COMMISSION, *et al.,*  
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

Petitioner Burlington Northern Railroad Company respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on May 2, 1986.

**OPINIONS BELOW**

The order and judgment of the Court of Appeals, which is not reported, appears in the Appendix at 1a to 5a. The order of the United States District Court for the Western District of Oklahoma, which is also unreported, appears in the Appendix at 6a to 17a.

**JURISDICTION**

The order and judgment of the Court of Appeals was entered on May 2, 1986. By order of July 14, 1986, Justice White extended the time within which a petition for writ of certiorari could be filed to August 30, 1986.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### STATUTORY PROVISIONS INVOLVED

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503 (1982), is set forth in the Appendix at 20a to 22a.<sup>1</sup>

### STATEMENT OF THE CASE

This case arises under section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"), Pub. L. No. 94-210, 90 Stat. 31, 54 (codified at 49 U.S.C. § 11503 (1982)). Section 306 declares discriminatory state taxation of railroad property to be an unreasonable burden on interstate commerce and confers jurisdiction on the federal courts to remedy such discrimination without regard to the amount in controversy or the citizenship of the parties. In the present case the District Court, prior to trial, dismissed petitioner Burlington Northern Railroad Company's complaint against the Oklahoma Tax Commission for want of subject matter jurisdiction, notwithstanding that Burlington Northern had alleged, and was prepared to prove, that its property had been treated less favorably for ad valorem tax purposes than the property of other commercial and industrial companies. The Court of Appeals affirmed, relying on its own prior ruling that federal courts lack jurisdiction over a complaint that a state has overvalued railroad property relative to other commercial and industrial property unless the railroad makes a strong pre-

<sup>1</sup> Although the language of section 306 was modified when the provision was recodified at 49 U.S.C. § 11503, the recodification effected no substantive change, and the original language is therefore authoritative. *Richmond, Fredericksburg & Potomac Railroad v. Department of Taxation*, 762 F.2d 375, 377 (4th Cir. 1985); *Clinchfield Railroad v. Lynch*, 700 F.2d 126, 128 n.1 (4th Cir. 1983). Accordingly, the Appendix sets forth the unmodified language of section 306, and that language will be cited throughout the Petition.

trial showing of "purposeful overvaluation . . . with discriminatory intent." App. at 2a.

Congress adopted section 306 as an integral part of a statute designed to relieve the nation's railroads from the debilitating effects of decades of overregulation and excessive taxation.<sup>2</sup> The passage of section 306 marked the culmination of a 15-year legislative effort to obtain relief from state tax systems that imposed a disproportionate tax burden on railroad property. Because interstate railroads are not adequately represented in local legislative bodies, and because their facilities cannot easily be relocated, Congress determined that "interstate carriers, especially railroads, are easy prey for State and local tax assessors." S. Rep. No. 630, 91st Cong., 1st Sess. 3 (1969).<sup>3</sup> As a result, Congress estimated that in 1975 the "railroads [were being] over-taxed by at least \$50 million each year." H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975). Given the "generally poor economic condition of the railroad industry" and the "effect such economic hardship is having on the ability of the industry to adequately serve our national rail transportation needs," Congress concluded that "discriminatory property

<sup>2</sup> The legislative history of the 4-R Act demonstrates that Congress intended to remedy a host of problems that had resulted in the bankruptcies of eight major railroads and had left virtually the entire industry in a precarious financial condition. S. Rep. No. 499, 94th Cong., 1st Sess. 2-3 (1975); H.R. Rep. No. 725, 1st Sess. 53 (1975). Indeed, Congress was concerned that, without the relief embodied in the 4-R Act, the nation's private railroads might not survive. S. 2718, 94th Cong., 1st Sess. § 101(a) (1976); cf. S. Rep. No. 499, 94th Cong., 1st Sess. 2-8 (1975).

<sup>3</sup> Various bills containing the substance of what became section 306 were considered over a span of more than a decade; the relevant legislative history thus includes committee reports and other materials predating the session of Congress during which the 4-R Act was passed. *Burlington Northern Railroad v. Lennen*, 715 F.2d 494, 497 (10th Cir. 1983), cert. denied, 467 U.S. 1230 (1984); *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860, 865 n.6 (9th Cir.), cert. denied, 464 U.S. 846 (1983).



and 'in lieu' taxation *should be ended.*" *Id.* (emphasis added).

Section 306 was intended "to put an end to the widespread practice of treating for tax purposes the property of common and contract carriers on a different basis than other property in the same taxing district." S. Rep. No. 630, 91st Cong., 1st Sess. 2 (1969). The statute makes it unlawful for a state or political subdivision to:

- (1) assess railroad property at a value that bears a higher ratio to the true market value of such property than the ratio that the assessed value of all other commercial and industrial property bears to the true market value of such property;
- (2) levy or collect any tax based on such an assessment;
- (3) levy or collect any ad valorem tax on railroad property at a higher rate than the rate generally applicable to other commercial and industrial property; or
- (4) impose any other tax that results in discriminatory treatment of a railroad carrier.

Because Congress was dissatisfied with the remedies available to railroads in state courts, section 306(2) gave federal district courts jurisdiction to hear railroad claims of state tax discrimination, notwithstanding the Tax Injunction Act, 28 U.S.C. § 1341 (1982). The federal courts were empowered by the statute to "grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section."<sup>4</sup> Section 306(2) also provided that

<sup>4</sup> One condition imposed in the law is that "no relief may be granted . . . unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property." § 306(2) (c).

the "burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law." § 306(2) (d).<sup>5</sup>

In implementing this congressional mandate, the lower courts have uniformly held that de jure property tax discrimination—which arises from the application of different tax rates, or different assessment percentages,<sup>6</sup> to railroad and non-railroad property—is strictly forbidden by the statute. The controversy in this case involves the issue of de facto discrimination.

De facto ad valorem property tax discrimination can arise in two ways. First, *non-railroad property* may be valued at *less than* its true market value (i.e., undervaluation). When this occurs, the ratio of assessed value to true market value for railroad property is artificially higher than the same ratio for commercial and industrial property because one side of the equation is skewed by the undervaluation. No court, including the court below,

<sup>5</sup> Since 1976, Congress has enacted substantially similar measures to protect motor carriers of property, Motor Carrier Act of 1980, Pub. L. No. 96-296, § 31, 94 Stat. 793, 823 (1980) (codified at 49 U.S.C. § 11503a (Supp. 1985)), interstate bus lines, Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (1982) (codified at 49 U.S.C. § 11503a (Supp. 1985)), and airlines, Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, § 532, 96 Stat. 671, 701 (1982) (codified at 49 U.S.C. § 1513(d) (1982 & Supp. 1985)). The airline statute, unlike the others, does not provide for federal court jurisdiction over discrimination claims. A case involving an unrelated issue under the airline counterpart of section 306 is presently pending before the Court in No. 85-732, *Western Airlines v. Board of Equalization*.

<sup>6</sup> Market value is the standard for valuation in all states where a property tax is imposed, but in most states the tax is applied to a percentage of market value rather than to full market value. That percentage is referred to as the "assessment percentage" or "assessment ratio," and the resulting taxable portion of full market value is termed the "assessed value" of the property. See S. Rep. No. 1483, 90th Cong., 2d Sess. 22-24 (1968).

has held this form of de facto discrimination to be outside the scope of section 306. Second, *railroad property* may be valued *in excess of* its true market value (*i.e.*, overvaluation). Here again, the practical result is to create a higher ratio of assessed value to true market value for railroad property than for non-railroad property. The decision below referred to challenges to this second form of de facto discrimination as "valuation" claims. The principal issue in this case is whether and to what extent claims involving this second form of de facto discrimination are cognizable under section 306.

Petitioner Burlington Northern filed the present action in the District Court on March 3, 1983, contending that respondents violated section 306(1)(a) by assessing Burlington Northern's property for the tax year 1982 at a ratio of assessed value to true market value higher than that for other commercial and industrial property.<sup>7</sup> Specifically, the complaint alleged that the actual ratio of assessed value to true market value for Burlington Northern's property was 26 percent, whereas the comparable ratio for other commercial and industrial property, determined on the basis of a sales-assessment ratio study, was 10.87 per cent. Complaint ¶ 40, App. at 32a.<sup>8</sup> This disparity arose not from the application of facially unequal assessment percentages, but rather from gross overvaluation of Burlington Northern's property, yielding an assessed value more than twice as great as the \$5.7

<sup>7</sup> Respondents are the Oklahoma Tax Commission, the State Board of Equalization, and the respective members of those agencies: Odie A. Nance, Robert T. Wadley, J.L. Merrill, George Nigh, Spencer Bernard, Leo Winters, Jack Craig, Clifton Scott, Dr. Leslie Fisher and Mike Turpen (hereafter, collectively, "the State"). Jurisdiction in the District Court was premised on 49 U.S.C. § 11503 and 28 U.S.C. §§ 1331 and 1337.

<sup>8</sup> The 10.87 percent ratio is not in controversy, since that figure was taken from a study conducted by the State itself.

million it should have been. Complaint ¶ 37, App. at 32a.<sup>9</sup>

Burlington Northern alleged not only that the assessment ratio was discriminatory, but also that the State intended to accomplish a discriminatory result. Significantly, the State's valuation of Burlington Northern's railroad system in 1981 was \$2.1 billion, of which 3.75 percent was allocated to Oklahoma. In that year, the State applied a 19 percent assessment percentage to Burlington Northern's Oklahoma property, resulting in a \$15 million assessed value. Complaint ¶ 25, App. at 29a-30a. However, a 1981 State study revealed that other commercial and industrial property was assessed at only 10.87 percent. Complaint ¶ 27, App. at 30a. The study thus established that the State could not, under any interpretation of section 306, continue applying its discriminatory 19 percent ratio to Burlington Northern. The State therefore inflated Burlington Northern's system valuation from \$2.1 billion to \$3.5 billion so that, after allocation, the resulting 1982 assessment would remain at virtually the same discriminatory level—\$13.7 million in 1982 vs. \$15 million in 1981—even using the 10.87 percent assessment ratio. Complaint ¶¶ 28, 36, App. at 30a, 32a. The State was thus able in 1982 to accomplish on a de facto basis exactly the same discriminatory result it had previously achieved through the de jure device of using a higher assessment percentage for railroad property.<sup>10</sup>

<sup>9</sup> The State arrived at a \$13.7 million assessment by starting with a total system value of \$3.575 billion, allocating 3.53 percent of that value to Oklahoma, and then applying a 10.87 percent assessment percentage. Complaint ¶ 30, App. at 30a-31a. Burlington Northern calculated a \$5.7 million assessment by applying the same allocation and assessment percentages used by the State, but starting with a total system value of \$1.495 billion. Complaint ¶ 34, App. at 31a.

<sup>10</sup> Significantly, the District Court's decision acknowledged that the State had "violated § 11503 in years prior to 1982." App. at 16a.



On March 25, 1983, the State moved to dismiss Burlington Northern's claim for want of subject matter jurisdiction and for failure to state a claim. On August 25, 1983, while this motion was pending, the United States Court of Appeals for the Tenth Circuit issued its decision in *Burlington Northern Railroad v. Lennen*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984). In *Lennen*, the Tenth Circuit held that section 306 was intended to provide only what the court characterized as "equalization" relief (meaning relief from de jure discrimination, or de facto discrimination accomplished through undervaluation of non-railroad property). 715 F.2d at 497. The court expressly stated that "valuation" relief (i.e., relief from de facto discrimination accomplished through overvaluation of railroad property) did not fall within the scope of section 306. *Id.* Although the court framed this rule in categorical terms, it proceeded to carve out a narrow exception permitting a railroad to challenge the state's determination of "true market value" if it could make a "strong showing" of "purposeful overvaluation . . . with discriminatory intent." *Id.* at 498.

Despite its disagreement with *Lennen*, Burlington Northern sought and obtained leave from the District Court to amend its complaint to include a more explicit allegation of discriminatory intent. App. at 40a. On March 1, 1984, Burlington Northern submitted a supplementary brief, statement of facts, and affidavits in opposition to the State's motion to dismiss.<sup>11</sup> On January 8, 1985, without further proceedings, the District Court granted the State's motion to dismiss for want of subject matter jurisdiction. Rejecting petitioner's arguments

<sup>11</sup> Burlington Northern specifically stated that it was submitting its statement of facts and affidavits solely for the purpose of demonstrating the existence of a genuine issue of material fact regarding intent. Burlington Northern requested that, if the District Court intended to decide any factual issues regarding jurisdiction, a full evidentiary hearing should be held.

for an evidentiary hearing, the court ruled that "there must be a strong showing of intentional discrimination *whether the facts supporting the showing are disputed or not.*" App. at 12a (emphasis added). Applying that standard, the court resolved a number of disputed factual issues in favor of the State, relying solely on the conflicting affidavits of the parties.<sup>12</sup> Based on those findings, the District Court held that Burlington Northern had failed to present the requisite "strong showing" of "purposeful overvaluation . . . with discriminatory intent."

Burlington Northern appealed to the Tenth Circuit and requested an *en banc* hearing for the purpose of reconsidering the *Lennen* decision. The suggestion of *en banc* hearing was supported by the United States and the Association of American Railroads as *amici curiae*. The full Tenth Circuit denied the requested *en banc* hearing. App. at 19a. On May 2, 1986, the panel reaffirmed the ruling in *Lennen* and upheld the District Court's dismissal of Burlington Northern's complaint. The Court of Appeals specifically ruled that the District Court could dismiss a section 306 complaint alleging discrimination accomplished by overvaluation—without an evidentiary hearing of any kind—if it found the plaintiff's pre-trial "showing" of discriminatory intent inadequate to meet the stringent non-statutory standard formulated in *Lennen*. App. at 3a.

<sup>12</sup> In particular, the court rejected a key link in the chain of circumstantial evidence produced by Burlington Northern to show discriminatory intent. Although Burlington Northern contended that the State had discriminatorily increased its system valuation from a 1981 level of \$2.1 billion to a 1982 level of more than \$3.5 billion solely to overcome the drop in the allowed assessment percentage, the District Court determined that "there is nothing to indicate that system values were intentionally inflated to compensate for the reduced assessment ratio." App. at 15a.



## REASONS FOR GRANTING THE WRIT

The Tenth Circuit has opened a broad loophole in a federal statute that Congress plainly intended to be a comprehensive response to the perennial problem of state tax discrimination against interstate railroads. This holding—which the Tenth Circuit has refused to reconsider in the face of contrary precedent from other courts of appeals—threatens to revive the very conditions that prompted Congress to enact section 306 in the first place. Because the decision below is so sharply out of line with the decisions of the other circuits, and because it directly undermines Congress' considered resolution of a serious national problem, review by this Court is urgently required to clarify the proper construction of section 306.

### I. THE DECISION BELOW IS DIRECTLY CONTRARY TO THE DECISIONS OF AT LEAST TWO OTHER CIRCUITS AND IS FUNDAMENTALLY INCONSISTENT WITH NUMEROUS OTHER DECISIONS CONSTRUING SECTION 306

The decision below, like that in *Lennen*, essentially restricts a federal court's analysis of discrimination claims under section 306 to one side of the equation mandated by the statute. A court may look to see whether the state has discriminated on a de facto basis by undervaluing commercial and industrial property relative to its true market value. The court may not, however, inquire closely whether the same discriminatory result has been achieved by overvaluing railroad property. Absent a strong pre-trial showing of "purposeful overvaluation . . . with discriminatory intent," the district court must simply accept the state's valuation of the railroad's property as conclusive evidence of "true market value." Not only is this result totally at odds with the language and purpose of the statute, but it is in sharp conflict with the decisions of at least two other courts of appeals.

In *Atchison, Topeka & Santa Fe Railway v. Board of Equalization*, 795 F.2d 1442 (9th Cir. 1986) ("*Santa*

*Fe*"), the United States Court of Appeals for the Ninth Circuit addressed the precise issue posed here, reversing a district court decision that had dismissed a claim of discrimination accomplished through overvaluation of railroad property. The Ninth Circuit concluded that "the district court erred in holding that the railroads' valuation challenge was outside the scope of the 4-R Act," *id.* at 1445, observing unequivocally that "federal courts have jurisdiction over claims of rail property overvaluation." *Id.* at 1446. In doing so, the Ninth Circuit expressly considered whether it should apply the discriminatory intent standard of *Lennen*, but "declined to adopt the Tenth Circuit's threshold requirement." *Id.*<sup>13</sup>

Similarly, the United States Court of Appeals for the Eighth Circuit has ruled that "there is no intent element in section 306." *Burlington Northern Railroad v. Bair*, 766 F.2d 1222, 1226 (8th Cir. 1985). In *Bair*, where the plaintiff railroad challenged de facto discrimination achieved both through undervaluation of commercial and

<sup>13</sup> The panel majority went on to hold that the district court should have deferred to pending state court litigation on the valuation issue. *Id.* One judge accepted the majority's ruling on the jurisdictional question involved in this case, but disagreed on the abstention issue. *Id.* at 1449-50 (Norris, J., dissenting). Although neither opinion mentioned this fact, the majority's abstention holding in *Santa Fe* is in direct conflict with a decision of the United States Court of Appeals for the Eleventh Circuit in *Southern Railway v. State Board of Equalization*, 715 F.2d 522 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), where a district court decision abstaining in a section 306 overvaluation case was reversed (*see discussion infra*). Thus, although the Ninth Circuit decision in *Santa Fe* squarely supports Burlington Northern's position on the jurisdictional issue in this case, its abstention ruling heightens the doubt and confusion in the lower courts regarding the proper application of section 306. (A petition for rehearing on the abstention issue in *Santa Fe* was filed August 14, 1986, arguing among other things that the Ninth Circuit misconstrued the facts regarding the state litigation and that the relevant circumstances vary significantly among the plaintiffs in that case.)

industrial property and overvaluation of railroad property, the state revenue department took the position "that section 306 does not confer jurisdiction on the federal courts to review state valuations *at all*." *Id.* at 1225 (emphasis added). The Eighth Circuit expressly rejected that view. "[I]f we were to accept the [State's] position," the court observed, "section 306 would be a mere shadow of the relief from discriminatory taxation which Congress intended." *Id.* The court continued:

*Unless the district court makes its own findings regarding valuation, states would be free to discriminate against railroads by assessing a value far in excess of the true market value, while assessing all other property at true market value, and then asserting, as [the state] does, that assessed value is always equal to true value. Regardless of whether it occurs purposefully or by honest error, section 306 (1)(a) forbids this type of discrimination.*

*Id.* at 1225-26 (emphasis added); see also *id.* at 1226 (to succeed on a section 306 claim, railroad "need only prove the accurate values, *not purposeful undervaluation or overvaluation*") (emphasis added).

In its opinion in this case, the Tenth Circuit acknowledged, with some understatement, that "there is language in [*Bair*] that may be read as inconsistent with our intentional discrimination ruling in *Lennen*." App. at 3a. The court declined to follow *Bair*, however, offering two baseless reasons for distinguishing it from the holding in *Lennen*.

The Tenth Circuit first asserted that the discussion of the question in *Bair* is "dicta" because the appellant (Burlington Northern) had not adequately challenged federal court jurisdiction over "valuation" claims. Not only did Burlington Northern properly appeal, however, but the appellee in *Bair* clearly put the relevant point in issue by arguing that challenges to state valuations are not cognizable at all under section 306. 766 F.2d at 1225.

Since the district court decision in *Bair* could have been upheld on the basis of any argument advanced by the appellee—whether or not relied upon by the lower court<sup>14</sup>—the Eighth Circuit's ruling on this issue was plainly necessary to its decision and therefore cannot in any way be construed as *obiter dictum*.

The second proffered distinction—that the two decisions cannot be in conflict because *Bair* itself purported to distinguish *Lennen*—is purely semantic. While the Eighth Circuit attempted to characterize *Lennen* as a case "deal[ing] with overvaluation claims," rather than the "equalization claim" presented in *Bair*, 766 F.2d at 1225, in both cases the railroad claimed de facto discrimination resulting from overvaluation of railroad property.<sup>15</sup> The only meaningful difference between *Bair* and *Lennen* lies in the result reached, not the issue presented.<sup>16</sup>

This sharp conflict between the Tenth Circuit's ruling and the decisions of the Eighth and Ninth Circuits is not the only reason for this Court to grant review of the decision below. The Eleventh Circuit has also addressed the issue of discrimination practiced through overvaluation of railroad property, albeit in a slightly different

<sup>14</sup> *California Bankers Association v. Shultz*, 416 U.S. 21, 71 (1974); *Industrial Risk Insurers v. Creole Production Services*, 746 F.2d 526, 527 n.1 (9th Cir. 1984).

<sup>15</sup> *Cf. Union Pacific Railroad v. State Tax Commission*, 635 F. Supp. 1060, 1065 (D. Utah 1986) ("distinction between valuation claims and equalization claims . . . is tenuous at best").

<sup>16</sup> The ultimate demonstration of the direct conflict between *Bair* and the Tenth Circuit's rule is provided by the recently issued district court decision on remand in *Bair*. In contrast to the district court in this case, which dismissed petitioner's complaint out of hand, the district court in *Bair* determined for itself the proper method for determining the "true market value" of the railroad's property, without requiring any showing of purpose or intent. *Burlington Northern Railroad v. Bair*, No. 83-100-A (S.D. Iowa July 16, 1986) (reprinted in Appendix at 43a).



context. In *Southern Railway v. State Board of Equalization*, 715 F.2d 522 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), the district court had abstained from hearing the claim of a group of railroads that their property was overvalued relative to non-railroad property. The Eleventh Circuit reversed, holding that "Congress meant *unconditionally* to ensure a federal forum for section 11503 claims . . . in cases alleging de facto discrimination as well as de jure." 715 F.2d at 527 (emphasis added).

Although the Eleventh Circuit recognized that "judicial appraisal of valuation techniques could well affect the state's choice of future assessment methods," *id.* at 529, it nonetheless concluded that the congressional intent embodied in section 306 should prevail. "Congress thoroughly considered the effects the Act would have on state taxation policies and practices," the court commented. "After weighing these effects, Congress concluded that both a federal remedy and a federal forum were necessary to further the strong national policy of protecting interstate commerce from the disruptive effects of discriminatory state and local taxation of railroad property." *Id.*

These cases, in addition to presenting a clear conflict, illustrate a more general point. The Tenth Circuit's assumption that "it is by no means clear that § 306 was intended to provide relief from every form of de facto discrimination," *Lennen*, 715 F.2d at 497, is at odds with the analysis of every other court of appeals that has examined this statute. The Eighth Circuit, for example, has plainly stated that the purpose of section 306 was to prevent tax discrimination against railroads "in any form whatever." *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). The Fourth Circuit has observed that section 306 "clearly and unambiguously prohibits all forms of discriminatory taxation of railroads." *Richmond, Fredericksburg & Potomac Railroad v. Department of Taxa-*

*tion*, 762 F.2d 375, 379 (4th Cir. 1985). In *Southern Railway*, the Eleventh Circuit similarly noted that the "legislative history and broad language of the Act show Congress possessed a general concern *with discrimination in all of its guises*." 715 F.2d at 528 (emphasis added).<sup>17</sup>

The decision below is not only out of step with the decisions of other courts of appeals, but also conflicts directly with the decisions of at least two district courts. In *Burlington Northern Railroad v. Department of Revenue*, No. C85-767T (W.D. Wash. Oct. 25, 1985) (reprinted in Appendix at 71a), the District Court for the Western District of Washington specifically held, in the context of an overvaluation claim, that "§ 306 discrimination need not be purposeful or intentional by the defendants." App. at 74a (citing *Bair and Louisville & Nashville Railroad*). Similarly, the District Court for the District of Oregon, in *Union Pacific Railroad v. Department of Revenue*, No. 85-2102LE (D. Or. May 6, 1986) (reprinted in Appendix at 77a), has categorically rejected the argument "that the court does not have jurisdiction to make an independent determination of the true market value of railroad property." App. at 79a.<sup>18</sup>

Indeed, one of the strongest criticisms of *Lennen* has come from a district court within the Tenth Circuit that

<sup>17</sup> See also *Louisville & Nashville Railroad v. Department of Revenue*, 736 F.2d 1495, 1498-99 (11th Cir. 1984) (holding "[d]iscriminatory intent is not a precondition to recovery" when a railroad alleges de facto discrimination arising from undervaluation of commercial and industrial property); *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860, 866 n.7 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983) (section 306 applies when the state "by administrative practice inflate[s] the true market value of rail-transportation property relative to other commercial and industrial property, thereby resulting in a higher assessment ratio for rail-transportation property") (dictum).

<sup>18</sup> However, after the Ninth Circuit decision in *Santa Fe*, see *supra* note 13, the Oregon court reconsidered its decision not to abstain, reflected at App. at 79a-80a.

felt constrained to follow the *Lennen* rule despite what the court perceived as serious flaws in its reasoning. In *Union Pacific Railroad v. State Tax Commission*, 635 F. Supp. 1060 (D. Utah 1986), the District Court for the District of Utah noted that, "by putting the state's valuation of railroad property off limits, the Court of Appeals has in effect required district courts to grant relief after doing only half a job." *Id.* at 1067. "Congress," the court continued

clearly thought that the states had discriminated against railroads and could not be trusted to police themselves—hence this federal legislation. And overvaluation is one obvious form of discrimination. The [*Lennen*] decision may perpetuate discrimination against railroads by placing one leg of the caliper for measuring discrimination—valuation—firmly in the hands of the very party accused of discriminating (the state). *Id.*

This destructive conflict among the lower federal courts is of particular concern to Burlington Northern and other interstate railroads because of the far-flung nature of their operations. Burlington Northern operates more than 26,000 miles of track in some 25 states, extending into more than half of the federal judicial circuits. The circuits in conflict here are precisely those in which the bulk of Burlington Northern's railroad property is located. Claims of state tax discrimination by Burlington Northern are thus subject to very different standards depending upon whether they arise in the Tenth Circuit (where Burlington Northern has property in five of the six states), or in the Eighth and Ninth Circuits (where Burlington Northern has property in twelve of the sixteen states).

Moreover, an interstate railroad faces a frustrating practical difficulty in the jurisdictions where this issue has not yet been addressed. If it brings a state court challenge to its property valuation, along with a federal court claim under section 306, it risks encountering the

federal court abstention procedure mandated by the Ninth Circuit in *Santa Fe*. See *supra* note 18. This result could conceivably cost the railroad its right to a federal forum. Alternatively, if the railroad brings a federal claim only, it risks having its complaint dismissed under the *Lennen* rule, even after the state law deadline for challenging its property valuation has passed. This Hobson's choice is manifestly unfair.

Until the issue posed in this case is definitively resolved, railroads across the country have little choice but to follow a wasteful and inefficient two-track litigation strategy in an effort to protect both the federal and state forum. Such a strategy unnecessarily burdens both court systems without providing any ultimate assurance that the right Congress conferred in section 306—the right to be free from state tax discrimination—will be adequately protected. Resolution of this conflict is therefore urgently required.

## II. THE DECISION BELOW SERIOUSLY UNDERMINES CONGRESS' COMPREHENSIVE RESPONSE TO A PRESSING NATIONAL PROBLEM

That Congress perceived state property tax discrimination against interstate railroads as a serious threat to the financial health of the railroad industry cannot be questioned. Congress studied this issue in great depth over a period of more than 15 years leading up to passage of the 4-R Act. Report after report found that interstate railroads paid excessive state taxes totaling tens of millions of dollars each year as a result of a variety of discriminatory state tax practices.<sup>19</sup> As the House Report on the predecessor bill to section 306 observed:

The Committee found that railroads are overtaxed by at least \$50 million each year. In view of the generally poor economic condition of the railroad

<sup>19</sup> Evidence of this problem dates back at least as far as 1944. See S. Rep. No. 1483, 90th Cong., 2d Sess. 3 (1968). In the period 1961 to 1968, Congress found that state tax discrimination against railroad property totaled more than \$800 million. *Id.* at 2.



industry and the effect such economic hardship is having on the ability of the industry to adequately serve our national rail transportation needs, the Committee believes discriminatory property and "in lieu" taxation should be ended.

H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975). Nor can there be any question that section 306 was intended to be a comprehensive solution to this problem. The legislation, in the words of one committee, "is needed, is appropriate and [is] adequate to accomplish the intended purpose of *eliminating discriminatory taxation*." S. Rep. No. 1483, 90th Cong., 2nd Sess. 8 (1968).

The decision below directly undermines Congress' express objective. The Tenth Circuit has, in effect, drawn a blueprint for the states that provides a clear path for discriminating against railroad property without triggering federal court review.<sup>20</sup> So long as a state does not manifest a demonstrable "discriminatory intent" in assigning an excessive valuation to railroad property, it can burden interstate railroads with disproportionate taxes and avoid section 306 entirely.<sup>21</sup> As the District Court for the District of Utah noted in *Union Pacific*, "As long as its figures can escape review, a state can discriminate more effectively against a railroad by overvaluing it than it can by assessing it at a higher rate." 635 F. Supp. at 1068.

In fact, there is significant evidence that states within the Tenth Circuit have already begun to take advantage

<sup>20</sup> Moreover, the decision below potentially undercuts the protection Congress gave the nation's motor carriers, bus lines and airlines through statutes modeled on section 306. See *supra* note 5.

<sup>21</sup> Other courts have been alert to the possibility that a "discriminatory intent" test would introduce a loophole into section 306. The Eleventh Circuit, for example, has specifically rejected a "discriminatory intent" test for discrimination resulting from undervaluation of commercial and industrial property. *Louisville & Nashville Railroad v. Department of Revenue*, 736 F.2d 1495, 1498-99 (11th Cir. 1985).

of this glaring loophole in the otherwise comprehensive federal ban on tax discrimination. For example, the taxable assessed valuation of Burlington Northern's property in Wyoming for 1985 was \$26,975,450. See App. at 81a. For 1986, Wyoming more than doubled Burlington Northern's taxable assessed valuation, to \$56,197,574. See App. at 83a.

The face of the statute discloses no basis for the Tenth Circuit's conclusion that "valuation" relief was not contemplated by Congress when it enacted section 306. The statute is quite specific in prohibiting "[t]he assessment . . . of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property . . . bears to the true market value of all such other . . . property." § 306(1)(a). Moreover, the statute expressly provides that "the burden of proof with respect to the determination of assessed value *and true market value* shall be that declared by the applicable State law." § 306(2)(d) (emphasis added). Nowhere does the statute even suggest that, in making the comparison of assessment ratios, the court must accept as conclusive the state's determination of the true market value of railroad property. Nor is any intent requirement stated anywhere in the statute or its legislative history. Indeed, section 306(1)(d) contains a catch-all provision forbidding the "imposition of any other tax which *results in discriminatory treatment* of a common carrier by railroad." § 306(1)(d) (emphasis added).

Faced with this clear and unambiguous prohibition of all discriminatory state taxation, the Tenth Circuit turned to the legislative history to support its constricted reading of the statute. Given the clarity of section 306, resort to legislative history was almost certainly unnecessary in this case. See, e.g., *Ex Parte Collett*, 337 U.S. 55, 61 (1949) ("no need to refer to the legislative history where the statutory language is clear"). In any event,



the legislative reports and debates overwhelmingly support the natural and logical construction of section 306 adopted by the other courts that have found jurisdiction over valuation claims. There is virtually no support for the Tenth Circuit's view that Congress consciously chose to exclude valuation relief from the scope of section 306, or meant to limit such relief to cases of purposeful overvaluation with discriminatory intent.

Perhaps the most telling passage in the legislative history was completely overlooked by the Tenth Circuit. In the report that accompanied the House version of the bill that became section 306, there is a description of the forms of discrimination prohibited by the bill. "Overvaluation" is first on the list in the House Report's description of forbidden tax practices:

This section amends Part I of the Interstate Commerce Act to include a new section which would make unlawful discriminatory ad valorem state or state subdivision taxation activities. Such tax practices include: (1) *overvaluation*; (2) collection of an unlawful tax; (3) collection of any ad valorem property tax at a higher tax rate than the tax rate generally applicable to commercial and industrial property in the taxing district; or (4) the imposition of a discriminatory "in-lieu tax."

H.R. Rep. No. 725, 94th Cong., 1st Sess. 113 (1975) (emphasis added).<sup>22</sup>

Nor is this the only significant indication of an intent to include "valuation" relief within the scope of section 306. The Senate Report on a virtually identical predecessor to section 306 contained an Appendix discussing the meaning of "true market value" as used in the statute. According to the Appendix, the bill provided:

<sup>22</sup> Although the Senate version of the bill was ultimately adopted in conference, the relevant language of the House bill is essentially identical to the Senate bill, and there is no indication in any of the reports that the Conference Committee differed with the House's interpretation of that language.

a single standard against which all affected assessments must be measured in order to determine their relationship to each other. . . . This standard is "true market value" (also the generally accepted standard for assessment purposes) *and the requirement is that carrier property be assessed at the same proportion of such value as the proportion at which all other property subject to the same tax rates is assessed.*

S. Rep. No. 1483, 90th Cong., 2d Sess. 22 (1968) (emphasis added). An individual statement attached to that report makes the point even clearer: "Under S. 927, a Federal court will necessarily be required to review State valuation principles and procedures in order to determine whether carrier operating property is assessed at a percentage of true market value that is higher than the assessment percentage of all other property." *Id.* at 26 (individual views of Senator Lausche) (emphasis added).

The other reports and hearings on the bills that preceded section 306 are replete with similar indications that relief from excessive and discriminatory state valuation of railroad property was part and parcel of the solution Congress devised for the discriminatory taxation problem.<sup>23</sup> As Representative Skubitz, a proponent of section 306, summed up in the debates on the measure:

<sup>23</sup> For example, the key federal and state entities with an interest in the legislation clearly indicated that this was their understanding of the proposed statute. See, e.g., *Tax Assessments on Common Carrier Property: Hearings on H.R. 4972 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 3 (1966) (letter from John W. Bush, chairman of the ICC) ("It appears that H.R. 4972 is intended to shift the final determination of 'true market value' of carrier property, as well as that of other property in a taxing district, from state courts to U.S. district courts"); *Discriminatory Taxation of Common Carriers: Hearings Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 101-02, 114 (1967) (statement of Charles F. Conlon, Executive Secretary, National Association of

In title VI we have tried to deal with the problem of discriminatory State taxes. Here, we provided that any constitutional provision or statute or practice by the States, or any subdivision of the State, which attempts to impose *a higher rate of tax [sic] than the true market value of the rail property*, would be considered a burden on interstate commerce and, therefore, unconstitutional.

121 Cong. Rec. 41341 (1975).<sup>24</sup>

In short, the Tenth Circuit has drastically limited the scope and effectiveness of a statute Congress plainly intended as a comprehensive solution to a pressing national problem. Because of the importance of avoiding a revival of the very conditions that prompted Congress to act in the first place, it is essential that this Court review the

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Tax Administrators, appearing on behalf of twenty-four states); see also *State Tax Discrimination Against Interstate Carrier Property: Hearings Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 59 (1969) (statement of Broley E. Travis, Consulting Valuation Engineer).

<sup>24</sup> The Tenth Circuit's ruling undermines another important purpose of section 306 as well. The legislative history clearly demonstrates that Congress meant to ensure railroads an effective central forum for determination of all claims of discriminatory state taxation practices. H.R. Rep. No. 725, 94th Cong., 1st Sess. 77 (1975). In some instances, because of the decentralized nature of property tax collection, a railroad was previously required to bring suit in dozens of local courts or agencies. *Id.* Moreover, the relief available in state court was often less effective than section 306 relief because many state courts reviewed assessment decisions under very lenient review standards. By providing a central federal forum, Congress intended to simplify the remedial system for the railroads and avoid costly and repetitive litigation over these issues. The *Lennen* rule, by contrast, once again remits railroads to the uncertain and inadequate avenues of relief available in the state courts in all cases where discrimination is practiced through overvaluation but purposefulness and discriminatory intent cannot readily be demonstrated.

decision below and definitively reject the Tenth Circuit's pernicious rule.<sup>25</sup>

### CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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<sup>25</sup> In addition to adopting a substantive rule that directly undermines the manifest intent of section 306, the courts below applied that rule in a manner that effectively deprived petitioner of any opportunity to prove its allegations of "purposeful overvaluation . . . with discriminatory intent." Because the procedure followed below is fundamentally at odds with the Federal Rules of Civil Procedure, review by this Court is required to prevent any recurrence of this approach.

The district court's principal procedural errors were: (1) treating "discriminatory intent" as a jurisdictional issue, rather than (at most) a properly plead element of Burlington Northern's claim for relief, see *Bell v. Hood*, 327 U.S. 678, 682-83 (1946), and (2) granting the state's motion to dismiss, without an evidentiary hearing, in the face of material issues of fact regarding intent, see *Data Disc, Inc. v. Systems Technology Associates*, 557 F.2d 1280, 1285 (9th Cir. 1977). The Tenth Circuit, on review, did nothing to rectify these serious departures from accepted procedure. Because these procedural errors are so fundamental, and because they seem likely to recur in future section 306 actions that may arise in the Tenth Circuit, they constitute a significant additional ground warranting review of the decision below.

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No. \_\_\_\_\_

Supreme Court, U.S.

FILED

AUG 30 1986

JOSEPH E. SPANIEL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Petitioner,*

v.

OKLAHOMA TAX COMMISSION, *et al.*,  
*Respondents.*

APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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APPENDIX

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

\_\_\_\_\_  
No. 85-1657  
(W.D. Oklahoma)  
(D.C. No. CIV 83-419-R)

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff-Appellant,*

v.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, Chairman  
of the Oklahoma Tax Commission; ROBERT T. WADLEY,  
Vice-Chairman of the Oklahoma Tax Commission; J.L.  
MERRILL, Secretary-Member of the Oklahoma Tax Com-  
mission; STATE BOARD OF EQUALIZATION OF THE STATE  
OF OKLAHOMA; GEORGE NIGH, Chairman of the State  
Board of Equalization of the State of Oklahoma; SPEN-  
CER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON  
SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, Mem-  
bers of the State Board of Equalization of the State of  
Oklahoma,

*Defendants-Appellees,*

UNITED STATES OF AMERICA and  
ASSOCIATION OF AMERICAN RAILROADS,  
*Amici Curiae.*

\_\_\_\_\_  
[Filed May 2, 1986]  
\_\_\_\_\_

ORDER AND JUDGMENT

Before McKAY, LOGAN, and BALDOCK, Circuit  
Judges.



Burlington Northern Railroad Company appeals from the dismissal of its complaint brought under § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503, for want of subject matter jurisdiction. The railroad had sought not "equalization" but "valuation" relief, claiming its properties were valued at more than true market value for Oklahoma ad valorem tax purposes.

This case is controlled by our decision in *Burlington Northern Railroad Co. v. Lennen*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984), in which we held that § 306 focused on equalization, not valuation, relief. *Id.* at 497-98. We reasoned that permitting railroads to use § 306 to challenge state calculation of the market value of properties "would impose significant burdens on district courts and would substantially thwart the tax collection process of states and their subdivisions." *Id.* at 498. Without an express directive from Congress, we were "unwilling to infer that it intended district courts to sit as state tax assessment boards for railroad property." *Id.* We therefore held that the district court had no jurisdiction to maintain such a suit unless a railroad could "make a strong showing of a purposeful overvaluation . . . with discriminatory intent." *Id.*

The district court correctly applied *Lennen* by requiring Burlington Northern to make a strong showing of intentional discrimination through overvaluation to establish jurisdiction. The district court considered material submitted by the parties but refused to hold a hearing or reserve the overvaluation question for trial. It stated accurately that *Lennen* contemplated resolution of the jurisdictional issue before trial on the merits. It found the railroad's materials insufficient to establish a strong prima facie case and dismissed for lack of jurisdiction.

Burlington Northern first asks us to overrule *Lennen*. If *Lennen* stands, the railroad contends the district court

(1) should not have ruled on the disputed jurisdictional facts without a hearing or until the trial on the merits; (2) erred in holding that Burlington Northern failed to make a strong showing of purposeful overvaluation with discriminatory intent; and (3) should have ordered discovery of a state-commissioned appraisal report on the railroad's property. We find no merit in any of these contentions and affirm.

Recognizing that a prior decision of this court can be overruled only by this court en banc, Burlington Northern sought en banc review. The request was denied by a unanimous vote of the court. We realize there is language in *Burlington Northern Railroad v. Bair*, 766 F.2d 1222 (8th Cir. 1985), that may be read as inconsistent with our intentional discrimination ruling in *Lennen*. 766 F.2d at 1225-26. But *Bair* expressly states that Burlington Northern did not appeal the district court's dismissal of its claim alleging overvaluation. *Id.* at 1225. The language therefore is dicta. Further, in the same discussion *Bair* cites but distinguishes *Lennen* and notes with approval *Atchison, Topeka & Santa Fe Railway v. Lennen*, 732 F.2d 1495 (10th Cir. 1984), a later related case. *Louisville and Nashville Railroad v. Department of Revenue*, 736 F.2d 1495 (11th Cir. 1984), which Burlington Northern also relies on in this appeal, does not purport to disagree with our first *Lennen* decision and, indeed, cites it as authority on one point.

We remain convinced of *Lennen*'s soundness and reaffirm its holding.

We agree with the district court that Burlington Northern failed to establish a strong initial showing of prima facie case of intentional discrimination. Burlington Northern did not allege knowledge of any state officials' remarks regarding an intent to discriminate in valuation. Nor did it allege any procedure that on its face demonstrated valuation discrimination against railroads,

e.g., a valuation formula that capitalized railroad earnings at a higher rate than earnings of other entities.

Burlington Northern also did not allege facts from which a trier of fact reasonably could infer discriminatory intent, such as assessments based on flat rates that take no account of an item's value, assessments that ignore changed business conditions, or unexplained radical changes in the methods for calculating value. The state tax board made assessment changes that attempted to consider business conditions and bring the railroad calculation into line with other calculations. Burlington Northern argues that these attempts were unsuccessful. Although that might be true, lack of success does not amount to a strong showing of discriminatory intent.

Burlington Northern alleges that prior overassessments of railroad property demonstrate discriminatory intent. Even if there was an earlier pattern of overassessment, the 1982 calculation challenged here broke the pattern. Earlier calculations had used questionably high assessment percentages; in 1982 Oklahoma equalized assessment percentages. The new system clearly reflected an attempt to comply with § 306 and rectify prior problems.

Burlington Northern argues that the sharply increased market value Oklahoma assigned to railroad property in 1982 and its expert's testimony that the true 1982 market value was much lower also show discriminatory intent. But it is uncontested that the 1982 figure was calculated differently than previous figures as part of the new system. The expert's testimony simply established that there was a difference of opinion over what the true market value was. Burlington Northern makes much of the fact that the new system's market value calculation fails to reduce "cost" by "obsolescence." But the new calculation appears to allow "depreciation." R. I, 27-28, 106, 128. Arguably the new calculation should *increase* "cost" by some amount for inflation.

Viewed in the light most favorable to Burlington Northern, the materials presented established the existence of a legitimate question over the actual market value of Burlington Northern property<sup>1</sup>, but not of a legitimate question regarding overvaluation with discriminatory intent. We therefore agree with the district court that Burlington Northern failed to make the strong *prima facie* showing required to establish jurisdiction.

Finally, we see no error in the district court's refusal to order the deposition of independent appraisers commissioned by the state. The court found the appraisers protected from the deposition under Fed. R. Civ. P. 26 (b) (4) (B), as expert witnesses who were consulted in anticipation of trial but not intended to be called at trial. Under that rule such witnesses may be deposed only under "exceptional circumstances." We may reverse the trial court's finding that no such circumstances were present only if it abused its discretion. It did not.

AFFIRMED.

/s/ Robert L. Hoecker  
ROBERT L. HOECKER  
Clerk

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<sup>1</sup> Oklahoma acknowledges that there is a conceivably valid dispute over the 1982 market value figure. There is no allegation that Burlington Northern has been prevented from pursuing state administrative and court remedies to settle it.



IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

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CIV 83-419-R

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*

—vs—

OKLAHOMA TAX COMMISSION; ODIE A. NANCE, Chairman of the Oklahoma Tax Commission; ROBERT T. WADLEY, Vice-Chairman of the Oklahoma Tax Commission; J. L. MERRILL, Secretary-Member of the Oklahoma Tax Commission; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, Chairman of the State Board of Equalization of the State of Oklahoma; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, Members of the State Board of Equalization of the State of Oklahoma,

*Defendants.*

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CIV 83-2165-R

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

*Plaintiff,*

—vs—

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, Chairman of the Oklahoma Tax Commission; ROBERT T. WADLEY, Vice-Chairman of the Oklahoma Tax Commission; J. L. MERRILL, Secretary-Member of the Oklahoma Tax Commission; STATE BOARD OF EQUALIZATION OF THE

STATE OF OKLAHOMA; GEORGE NIGH, Chairman of the State Board of Equalization of the State of Oklahoma; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, Members of the State Board of Equalization of the State of Oklahoma,

*Defendants.*

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[Filed Jan. 8, 1985]

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ORDER

The Plaintiffs in these actions seek relief from ad valorem tax assessments made against them by the Oklahoma taxing authorities, in particular by the Defendant Oklahoma Tax Commission (OTC). In the first action, No. CIV-83-419-R ("the 1982 tax case"), the single Plaintiff Burlington Northern demands the following relief for the 1982 tax year: (1) a judicial declaration that the Oklahoma ad valorem tax assessment procedure violates § 11503 of the Interstate Commerce Act, 49 U.S.C. § 10101 - § 11917 (1982); and, (2) a permanent injunction prohibiting the collection of the disputed amounts imposed thereunder. Similar relief is sought for the 1983 tax year in No. CIV-83-2165-R ("the 1983 tax case") by Burlington Northern and Missouri Pacific, the Plaintiffs St. Louis Southwestern and Missouri-Kansas-Texas having been dismissed from the action. Many of the legal and factual issues are identical in the two cases, and for that reason the Court ordered them consolidated for discovery and is yet considering consolidation for trial.

The Defendants have filed Motions to Dismiss in both actions. In the 1982 tax case the Defendant filed a Motion to Dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)

(6), which the Court deems moot in light of a subsequent amendment to the Complaint. More substantial, and the subjects of this Order, are the Motions to Dismiss for lack of subject matter jurisdiction filed in each of the cases pursuant to Fed. R. Civ. P. 12(b)(1). The motions have been fully briefed, voluminously so in the 1982 tax case, and the Court is now prepared to dispose of the motions in both cases in this Order. Accordingly, the Plaintiffs' applications for an evidentiary hearing and oral argument are denied, as those proceedings are unnecessary to a disposition of the motions.

### I.

The dispute that is the subject of these actions arises from the method used in Oklahoma to calculate railroad property values for the purpose of imposing ad valorem taxes. A proposed assessment is submitted by the OTC to the State Board of Equalization. If approved, this assessment becomes the property value amount used ultimately by the entities which actually levy ad valorem taxes. The assessment is determined by multiplying the "Oklahoma value" of the railroad's property by a predetermined assessment ratio. The Oklahoma value is determined by multiplying the railroad's "system value", the total appraised value of all railroad property, by a coefficient estimated to be the ratio of property held within the state to total property held by the railroad. The system value is determined by a complex appraisal formula which uses two factors: the railroad's "original cost depreciated" and the railroad's "capitalized income." In the past years the relative weight assigned to these factors has changed, with consistently more emphasis being placed on capitalized income.

The entire process is regulated to some extent by federal law, which prohibits discrimination against railroads in the assessment and imposition of property taxes. 49 U.S.C. § 11503 (1982). The statute prohibits two classes

of discrimination in taxation, which can be distinguished by the source of the disparate impact involved. *Cf. Louisville & Nashville Railroad Co. v. Department of Revenue*, 736 F.2d 1495, 1498 (10th Cir. 1984). One is *de jure* discrimination, which occurs when railroad property is taxed or assessed at a different rate than other "commercial and industrial property in the same assessment jurisdiction." 49 U.S.C. § 11503(b)(3). The second is *de facto* discrimination, which can occur despite imposition of facially fair tax or assessment rates. There are various forms of *de facto* discrimination, only one of which is relevant to these cases: taxing railroad property at an appropriate rate, but assessing or appraising railroad property at a value higher than its true market value. *See Burlington Northern Railroad Co. v. Lennen*, 715 F.2d 494, 497 (10th Cir. 1983), *cert. den.* 104 S.Ct. 2690 (1984). It is this form of *de facto* discrimination of which the Plaintiffs complain, and the relief they seek is referred to as valuation relief. *Id.*; *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981), *cert. den.* 454 U.S. 1086 (1981).

The Plaintiffs contend that the Defendants have intentionally overvalued their property in a disingenuous effort to maintain high taxes while appearing to comply with the directives of § 11503. Noting that the Defendants have long violated the statute by applying a higher assessment ratio to railroad property than to other commercial property, *see* 49 U.S.C. § 11503(b)(1), the Plaintiffs contend that the Defendants inflated the railroads' system values to compensate for a lower assessment ratio adopted to bring Oklahoma into compliance with the statute. Thus, it is the Plaintiffs' position that they are required to pay taxes on a greater portion of their property than are other commercial property holders, even though the assessment ratios are the same for both classes.

The Defendants do not disagree that these cases involve bona fide valuation disputes. Indeed, the Defend-



ants concede the existence of a valuation issue that the Plaintiffs are entitled to have adjudicated at some point. However, the Defendants deny that this Court is the proper forum to resolve such a dispute. They assert that federal courts lack jurisdiction over *de facto* discrimination claims for valuation relief under § 11503 in all but a limited number of cases. In support of this proposition the Defendants rely on the decision of the United States Court of Appeals for the Tenth Circuit in *Burlington Northern Railroad Co. v. Lennen*, 715 F.2d 494 (10th Cir. 1983), *cert. den.* 104 S. Ct. 2690 (1984).

In *Lennen*, the Court of Appeals considered a *de facto* discrimination claim similar to those at bar and concluded that the federal courts are without jurisdiction over such claims unless the "railroad can make a strong showing of purposeful overvaluation with discriminatory intent." 715 F.2d at 498. The Court based this conclusion on its finding that Congress in enacting § 11503 did not intend for the "railroads to escape the general noninterference rule of [28 U.S.C.] § 1341 to the extent that they could challenge the manner in which state assessment officials arrived at the fair market value of their property in federal court on a yearly basis." *Id.* The jurisdictional rule announced in *Lennen* serves two important purposes: It avoids an inevitable clog of federal dockets and it prevents unreasonable delay of the state tax collection process. *Id.* Thus, the limitation of jurisdiction to those cases involving a discriminatory intent is apparently a rule designed to weed out those valuation disputes best left to state entities for resolution.

Although the Plaintiffs believe *Lennen* to be erroneously decided, they concede that the law in its current form casts upon them the burden of establishing this Court's jurisdiction over the actions by proof of discriminatory intent. There seems to be some suggestion by the Plaintiffs that this case is outside *Lennen*, being *de facto* or perhaps *de jure* discrimination by application of differing

assessment ratios to railroads; however, in the main, the Plaintiffs acknowledge that their claim is one for overvaluation of railroad property by the Defendants. These actions therefore are subject to the rule in *Lennen*, and the Court may entertain them only if the Plaintiffs make out "a strong prima facie case of . . . intentional discrimination" by the Defendants in overvaluing the Plaintiffs' property. 715 F.2d at 498.

## II.

As a preliminary matter the Court must determine the appropriate procedure to be followed when a Fed. R. Civ. P. 12(b)(1) Motion to Dismiss is based on an alleged lack of jurisdiction under *Lennen*. The question presented is complex, as the jurisdictional issue is intimately entwined with the merits of a § 11503 claim. The Plaintiffs must prove intentional discrimination to prevail upon their claims as well as to establish federal jurisdiction. Thus, at first blush it appears that the jurisdictional issue should be reserved for trial on the merits.

This is essentially the argument made by the Plaintiffs. Noting the close relationship between the jurisdictional issue and the merits of their claims, they assert that the proper procedure is to treat the Motions to Dismiss as Motions for Summary Judgment or, if summary judgment be inappropriate, to reserve the issue of jurisdiction for trial. See, e.g., *Schramm v. Oakes*, 352 F.2d 143, 149 (10th Cir. 1965); *Baker v. Hunn Roofing, Inc.*, 399 F. Supp. 628, 630 (W.D. Okla. 1975). The Defendants disagree, apparently taking issue with the idea that jurisdictional questions may be required to await trial on the merits. The Defendants urge the Court to resolve the jurisdictional dispute prior to trial, as suggested by Fed. R. Civ. P. 12(d).

There is ample merit in the arguments of both the Plaintiffs and the Defendants. Nevertheless, the Court declines to adopt either position *in toto*. It is true that



summary judgment on the jurisdictional issue is appropriate when all the material facts pertaining to jurisdiction are undisputed. Fed. R. Civ. P. 56. However, the mere existence of a factual dispute concerning the Defendants' intent is not sufficient to warrant trial on the merits, as the Plaintiffs suggest. The Court should permit trial on the merits only if the Plaintiffs make the requisite "strong prima facie case of . . . intentional discrimination." *Lennen*, 715 F.2d at 498. The Court finds this to be a more stringent burden on the Plaintiffs than the burden involved in avoiding summary judgment; there must be a strong showing of intentional discrimination whether the facts supporting the showing are disputed or not. Thus, the Court concludes that these cases should proceed to trial on the merits only if the Plaintiffs carry the burden enunciated in *Lennen*. To hold otherwise would necessitate a trial on the merits in most, if not all, *de facto* discrimination cases, a result inconsistent with the express purposes of the restrictive *Lennen* rule. 715 F.2d at 498 ("Such a rule [broadening federal jurisdiction] would impose significant burdens on district courts . . .").

Accordingly, the Court concludes that the jurisdictional issue raised herein must be resolved prior to trial, subject of course to the power of the Court to dismiss the action any time it appears that jurisdiction is lacking. See Fed. R. Civ. P. 12(h) (3).

### III.

The Defendants' Motions to Dismiss raise the question whether the Plaintiffs can prove intentional discrimination by overvaluation of railroad property on the part of the Defendants. Because the Court finds that the Plaintiffs cannot do so in a sufficiently convincing manner to satisfy the jurisdictional requirement of *Lennen*, the Court concludes that these actions must be dismissed for lack of subject matter jurisdiction.

The Plaintiffs' argument that a prima facie case of intentional discrimination has been made in these cases rests upon two assertions: (1) That substantial changes were made in the method used by the OTC to determine the railroads' system value; and, (2) that such changes reflect an intent on the part of the Defendants to maintain aggregate railroad assessments at near 1981 levels, despite a reduction in the assessment ratio to comply with § 11503. While the Court agrees with the Plaintiffs' first assertion, it cannot accept the second.

It is undisputed that Oklahoma's assessment process for 1982 is substantially changed from that used in years past, including that used in 1981. First, the OTC determined in 1982 that railroad property must be assessed by the same assessment ratio used to assess other commercial and industrial property in Oklahoma. This determination represents a clear break with the past, and was necessary to bring Oklahoma into compliance with federal statute. 49 U.S.C. § 11503(b) (3). Second, there was a change in the relative weight assigned to the two factors used to determine the railroads' full system value. For 1982, original cost depreciated was weighted at sixty percent and capitalized income was weighted at forty percent, while in 1981 those factors had been weighted at seventy-five percent and twenty-five percent, respectively. This change in relative weight was an ongoing process which began in 1976. It should be noted that this shift in emphasis serves the interests of the railroads, which favor a valuation system based on capitalized income. Third, in 1982 the Director of the Ad Valorem Tax Division ceased holding assessment conferences with the railroads' tax managers. In years past these informal conferences had been used to explain the assessment procedure to the tax managers and to allow for negotiations in the valuation process. The conferences were discontinued at the direction of the OTC. Finally, in 1982 the OTC no longer reduced system value by a factor designed to account for "economic obsolescence." This reduction

had taken place at the assessment conferences through the negotiations between the Director and the tax managers and, when the conferences were discontinued, the obsolescence reduction abated with them. Thus, the 1982 tax year saw substantial changes in methodology from the 1981 tax year.

However, the Court cannot agree that those changes reflect intentional discrimination against the railroads. First, the utilization of a uniform assessment ratio was mandated by federal statute and in fact inured to the benefit of the railroads, as it brought a marked reduction in the assessment ratio applied to railroad property. Second, the change in weighting assigned to the valuation factors also benefitted the railroads, as by their own admission the railroads favor a valuation system based on capitalized income. In 1982 greater weight was assigned to capitalized income than ever before. Third, the discontinuation of assessment conferences, while facially unfavorable to the railroads, does not indicate intentional discrimination on the part of the Defendants. The conferences were discontinued as part of an effort to insure uniformity of treatment in valuation, a purpose furthered by removal of the inherent nonuniformity of the negotiation process with individual railroad representatives. Finally, the deletion of economic obsolescence reductions does not suggest discrimination, as the reductions were also a product of individual negotiations. Although the absence of such a reduction might imply higher system value, the Plaintiffs' remedy for this problem is valuation relief, which is not available in the federal courts absent intentional discrimination by the Defendants.<sup>1</sup> Thus, the Court concludes that the changes made in 1982 do not reflect intentional discrimi-

<sup>1</sup> In any event, the absence of the reduction does not imply higher system value in this case; despite the fact that no obsolescence reduction was allowed in 1982, Burlington Northern's Oklahoma value for 1982 was lower than that obtained with an obsolescence reduction in 1981.

nation on the part of the Defendants against the Plaintiffs.

Nor do any of the other facts present in the record reflect intentional discrimination. While there is some indication that the OTC was concerned that aggregate railroad assessments should remain near 1981 levels, there is nothing to indicate that system values were intentionally inflated to compensate for the reduced assessment ratio. Had the OTC been motivated solely by this concern, as the Plaintiffs assert, it could have eschewed the lower assessment ratio based on locally assessed commercial and industrial properties in favor of a higher assessment ratio, one which would take into account those properties which are centrally assessed. In the interest of complying with the statute, the OTC scrupulously chose to adopt the more conservative approach, despite the fact that the more profitable alternative has been found to be consistent with § 11503. *E.g.*, *Atchison, Topeka & Santa Fe Railway Co. v. Lennen*, 732 F.2d 1495, 1504-5 (10th Cir. 1984); *Ogilvie*, 657 F.2d at 208-9. Further, at least in the case of Burlington Northern, the Oklahoma value, the amount to which the assessment ratio is applied, is less in 1982 than in 1981, a fact which clearly negates any suggestion that 1982 system values were inflated, intentionally or otherwise, to offset a lowered assessment ratio. Thus, the Court cannot conclude that system values were manipulated to maintain high aggregate assessments in the face of a reduced assessment ratio.

Perhaps the most telling fact concerning allegations of intentional discrimination is that Burlington Northern's annual assessments have fallen gradually but constantly in every year since the current valuation system was adopted in 1976. The 1982 assessment is substantially less than the 1981 assessment, and indeed it is less than Burlington Northern's own self-assessment made in 1981. Far from establishing a strong *prima facie* case of intentional discrimination against the railroad, this pattern



does just the opposite; it suggests at least a modicum of equitable treatment by the Defendants. Such an inference is of course unnecessary, as the *Lennen* burden lies with the Plaintiffs, but it does indicate the failure of the Plaintiffs to make out "a strong prima facie case of . . . intentional discrimination." 715 F.2d at 498.

It is apparent that the Defendants have violated § 11503 in years prior to 1982. The Defendants themselves do little to deny this fact. However, neither the 1982 tax case nor the 1983 tax case raises the issue of past violations, other than to suggest that the earlier pattern of unfair treatment infers discrimination in these cases. The Court finds that these past violations do not infer such discrimination. The 1982 tax year marked a clean break with the past, produced by purposeful action on the part of the OTC to bring Oklahoma into compliance with § 11503. The 1982 and 1983 tax years are thus not a continuation of a past pattern of tax discrimination.

It must finally be noted that there is some indication that the Plaintiffs' property has in fact been overvalued. Indeed, the Defendants themselves admit the existence of a legitimate valuation dispute between the parties. However, as the Defendants contend, this is simply not a dispute that this Court can adjudicate or remedy. In the absence of a strong showing by the Plaintiffs of intentional discrimination on the part of the Defendants, the Court is without jurisdiction to entertain these *de facto* discrimination claims of overvaluation. *Lennen*, 715 F.2d at 498. The Plaintiffs must therefore air their complaints concerning Oklahoma's valuation process in a forum provided by the State of Oklahoma. Cf. *Burlington Northern Railroad Co. v. Lennen*, 573 F. Supp. 1155, 1167 (D. Kan. 1982), *aff'd*, 715 F.2d 494 (10th Cir. 1983), *cert. den.* 104 S. Ct. 2690 (1984).

## IV.

All evidence and arguments presented herein by the Plaintiffs were submitted by Burlington Northern in opposition to the Defendants' Motion to Dismiss in the 1982 tax case. The Motion to Dismiss was much less extensively briefed in the 1983 tax case. Nevertheless, the Court concludes that the evidence and arguments pertain equally to both cases. The differences between the two are that there are multiple Plaintiffs in the 1983 case and that 1983 property valuations are at issue. Presumably, the evidence relied upon to establish intentional discrimination is the same for both cases; indeed, the Plaintiffs suggest as much in their Motion to Consolidate these cases for discovery and trial. In any event, the Plaintiffs apparently find the evidence presented in the 1982 tax case to be sufficient to decide the jurisdictional issue in the 1983 tax case, as they have chosen not to supplement the record in the latter case beyond that already presented in the 1982 tax case. Thus, the Court concludes that the jurisdictional issue in both cases turns on the jurisdictional facts presented in the 1982 tax case, and that the result must be the same in both cases.

Accordingly, the Defendants' Motion to Dismiss in No. CIV-83-419-R, and their Motion to Dismiss in No. CIV-83-2165-R, are both granted. Both actions are hereby dismissed for lack of subject matter jurisdiction. Separate judgments will be entered reflecting the action of the Court.

IT IS SO ORDERED this 8th day of January, 1985.

/s/ David L. Russell  
DAVID L. RUSSELL  
United States District Judge



IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

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CIV 83-419-R

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*

-vs-

OKLAHOMA TAX COMMISSION; ODIE A. NANCE, Chairman  
of the Oklahoma Tax Commission; ROBERT T. WADLEY,  
Vice-Chairman of the Oklahoma Tax Commission; J. L.  
MERRILL, Secretary-Member of the Oklahoma Tax Com-  
mission; STATE BOARD OF EQUALIZATION OF THE STATE  
OF OKLAHOMA; GEORGE NIGH, Chairman of the State  
Board of Equalization of the State of Oklahoma;  
SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIF-  
TON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN,  
Members of the State Board of Equalization of the  
State of Oklahoma,

*Defendants.*

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[Filed Jan. 8, 1985]

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JUDGMENT

In accordance with the Order entered this same 8th  
day of January, 1985, it is ORDERED, ADJUDGED  
and DECREED that the above entitled action is dismissed  
for lack of subject matter jurisdiction.

IT IS SO ORDERED this 8th day of January, 1985.

/s/ David L. Russell  
DAVID L. RUSSELL  
United States District Judge

NOVEMBER TERM—December 9, 1985

Before William J. Holloway, Jr., Honorable James E.  
Barrett, Honorable Monroe G. McKay, Honorable James  
K. Logan, Honorable Stephanie K. Seymour, Honorable  
John P. Moore and Honorable Stephen H. Anderson,  
Circuit Judges.

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No. 85-1657

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff-Appellant,*  
v.

OKLAHOMA TAX COMMISSION; ODIE A. NANCE, *etc., et al.,*  
*Defendants-Appellees,*

UNITED STATES OF AMERICA, ASSOCIATION OF  
AMERICAN RAILROADS,  
*Amici Curiae.*

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This matter comes on for consideration of appellant's  
motion for hearing en banc, and the briefs in support of  
appellant's motion for hearing en banc filed by the United  
States of America and the Association of American Rail-  
roads, in the captioned cause.

Upon consideration whereof, appellant's motion for  
hearing en banc is denied by the Court.

/s/ Howard K. Phillips  
HOWARD K. PHILLIPS  
Clerk

# PROHIBITING DISCRIMINATORY TAX TREATMENT OF TRANSPORTATION PROPERTY

SEC. 306. Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:

"SEC. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

"(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

"(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

"(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

"(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

"(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

"(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

"(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed

in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

“(3) As used in this section, the term—

“(a) ‘assessment’ means valuation for purposes of a property tax levied by any taxing district;

“(b) ‘assessment jurisdiction’ means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

“(c) ‘commercial and industrial property’ or ‘all other commercial and industrial property’ means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

“(d) ‘transportation property’ means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.”

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

—  
CIV-83-419 T

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*

vs.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, Chairman of the Oklahoma Tax Commission; ROBERT T. WADLEY, Vice-Chairman of the Oklahoma Tax Commission; J. L. MERRILL, Secretary-Member of the Oklahoma Tax Commission; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, Chairman of the State Board of Equalization of the State of Oklahoma; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, Members of the State Board of Equalization of the State of Oklahoma,

*Defendants.*

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[Filed Mar. 3, 1983]  
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COMPLAINT FOR INJUNCTIVE  
AND DECLARATORY RELIEF

1. This is a civil action seeking to restrain and enjoin the Defendants, and those in active concern and active participation with them, from levying or collecting certain ad valorem taxes from the Plaintiff for the 1982 tax year to the extent that such taxes are based upon assessments that are excessive and unlawful under Section 306 of the Railroad Revitalization and Regulatory Reform



Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (February 5, 1976), now codified as 49 U.S.C. § 11503 and referred to herein as "Section 306." Plaintiff also seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 that the Defendants' assessments of the Plaintiff's property for the 1982 tax year, and the levy or collection of excessive ad valorem taxes based upon such assessments, violate Section 306.

### JURISDICTION

2. Jurisdiction of this Court is based upon the following grounds:

a. Section 306(2) which confers jurisdiction upon district courts of the United States (notwithstanding 28 U.S.C. § 1341 and without regard to amount in controversy or citizenship of the parties) to prevent a state, subdivision of a state, or any authority acting for a state or subdivision of a state, from levying or collecting ad valorem taxes that are based upon assessments of rail transportation property that bear a higher ratio to the true market value of such rail transportation property than the ratio at which other commercial and industrial property is assessed in the same assessment jurisdiction;

b. 28 U.S.C. § 1337 (as more fully appears herein, this action arises under an act of Congress regulating commerce); and

c. 28 U.S.C. § 1331 [as more fully appears herein, this action arises under Article I, § 8, Cl. 3 (commerce clause) and presents a federal question].

### PARTIES

3. Plaintiff, Burlington Northern Railroad Company (BN), a Delaware corporation with its principal place of business located in the State of Minnesota, BN is a common carrier by railroad and is duly qualified to do business in the State of Oklahoma. BN operates in the following counties of the State of Oklahoma: Alfalfa,

Blaine, Bryan, Caddo, Canadian, Carter, Choctaw, Comanche, Craig, Creek, Custer, Dewey, Garfield, Grady, Grant, Hughes, Jackson, Johnston, Kay, Kiowa, LeFlore, Lincoln, McCurtain, Major, Marshall, Murray, Muskogee, Noble, Okfuskee, Oklahoma, Okmulgee, Ottawa, Pawnee, Pontotoc, Pushmataha, Rogers, Seminole, Tillman, Tulsa, Washita and Woods.

4. Defendant, Oklahoma Tax Commission, is a commission of the State of Oklahoma authorized by law to make findings of fact and recommendations to the State Board of Equalization of the State of Oklahoma as to the value of all taxable property of railroads and public service corporations within the State of Oklahoma. The Oklahoma Tax Commission maintains its principal offices in Oklahoma City, Oklahoma.

5. Defendant, Odie A. Nance, is Chairman of the Commission.

6. Defendant, Robert L. Wadley, is Vice-Chairman of the Commission.

7. Defendant, J. L. Merrill, is a Secretary-Member of the Commission.

8. Defendant, State Board of Equalization of the State of Oklahoma (State Board), is an agency of the State of Oklahoma responsible for the valuation and assessment of all taxable property of railroad corporations and public service corporations within the State of Oklahoma. The State Board maintains its principal offices in Oklahoma City, Oklahoma.

9. Defendant, George Nigh, is the Chairman of the State Board.

10. Defendants, Spencer Bernard, Leo Winters, Jack Craig, Clifton Scott, Dr. Leslie Fisher and Mike Turpen are members of the State Board.

## AD VALOREM TAXATION IN OKLAHOMA

11. Under Oklahoma Statutes Annotated (Okla. Stat. Ann.), tit. 68, § 24.04, all real and personal property in the state, except that which is specifically exempted by law or relieved from ad valorem taxation by reason of a payment of an in lieu tax, is subject to ad valorem taxation.

12. Under Okla. Stat. Ann. tit., 68, § 2427, all taxable tangible personal property must be assessed at no more than thirty-five percent (35%) of its fair cash value, estimated at the price it would bring at a fair voluntary sale as of the first day of January. All taxable real property must be assessed at no more than thirty-five percent (35%) of its fair cash value estimated at the price it would bring at a fair voluntary sale as of the first day of January for (a) the highest and best use for which such property was actually used during the preceding calendar year; or (b) the highest and best use for which such property was last classified for use, if not actually used during the preceding calendar year.

13. Under Okla. Stat. Ann., tit. 68, § 2444, railroad property is subjected to ad valorem taxation for county, municipal, public school and other purposes to the same extent as the real and personal property of private persons. Every railroad and public service corporation doing business in Oklahoma must return to the Commission, on or before March 15 of each year, sworn lists or schedules of its taxable property listing the amount, kind and value of such property as it existed on the preceding, January 1.

14. Under Okla. Stat. Ann., tit. 68, § 2454, the Commission must make findings as to the assessment of all railroad and public service corporation property and present its recommendations regarding such assessments to the State Board for final action. The Commission determines a recommended assessment of a railroad's property

in the following manner: (a) the Commission first estimates the full system value of the railroad's operating property wherever located; (b) the Commission allocates a portion of the railroad's full system value to the State of Oklahoma using an allocation percentage, or factor; and (c) the Commission multiplies the railroad's allocated system value by an assessment percentage or ratio. The resulting number is the Commission's recommended assessment.

15. Under Okla. Stat. Ann., tit. 68, § 2443, the property of all railroad and public service corporations must be assessed annually by the State Board at no more than thirty-five percent (35%) of its fair cash value estimated at the price it would bring at a fair voluntary sale.

16. Under Okla. Stat. Ann., tit. 68, § 2456, the State Board must cause the assessed valuations of the property of railroad and public service corporations to be certified by the State Auditor and inspector to the county assessors of each county in which such property is located. County assessors must enter such valuations on the county assessment rolls and subject such assessments to the same levies as other property.

17. Under Okla. Stat. Ann., tit. 68, § 2462, the Commission must render its findings as to the adjustment and equalization of the valuation of real and personal property throughout the State of Oklahoma and present such findings and recommendations with the State Board.

18. Under Okla. Stat. Ann., tit. 68, § 2463, the State Board must examine the various county assessments and equalize, correct and adjust such assessments as between counties by increasing or decreasing the aggregate assessed value of any property or class of property in one or more counties so that such assessments conform to the definition of fair cash value, and so that assessment rolls are corrected to adjust and equalize the valuation of real and personal property throughout the state.



19. Under Okla. Stat. Ann., tit. 68, § 2430, ad valorem taxes are due on November 1 of each year and become delinquent unless paid in two equal installments on January 1 and April 1 following the assessment date.

### SECTION 306

20. Section 306, a copy of which is attached to this Complaint as Exhibit A, declares discriminatory taxation of rail transportation property by states, political subdivisions of a state, or governmental entities or persons acting on behalf of such states or subdivisions, to constitute an unreasonable and unjust discrimination against and an undue burden upon interstate commerce. Section 306 states (in part):

"It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applica-

ble to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

21. Section 306 defines "assessment" as "valuation for purposes of a property tax levied by any taxing district."

22. Section 306 defines "transportation property" to mean "transportation property, as defined in regulations of the [the Interstate Commerce] Commission, which is owned or used by common carrier by railroad subject to this chapter or which is owned by the National Railroad Passenger Corporation." All operating property of the BN that is subject to ad valorem taxation by the State of Oklahoma is "transportation property" within the meaning of Section 306.

23. Section 306 defines "commercial and industrial property" to mean "all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy."

24. Section 306 was enacted on February 5, 1976, and, by its terms, became effective February 5, 1979. The purpose of delaying the effective date of Section 306 for a period of three years from its enactment was to give states an opportunity to conform their assessment laws and practices to the requirements of Section 306.

### ASSESSMENT OF BN's PROPERTY FOR THE 1982 TAX YEAR

25. For the 1981 tax year, the State Board determined the full system value of BN to be \$2,107,321,200. Based upon an allocation factor of 3.75% and an assessment



percentage or ratio of 19%, BN's assessment for the 1981 tax year was \$15,014,650.

26. BN filed with the Commission a timely return of its property for the 1982 tax year.

27. A sales assessment ratio study conducted by the State of Oklahoma in 1981 showed that the average ratio of assessed value to true market value of commercial and industrial property in the State of Oklahoma was no greater than 10.87%.

28. On May 6, 1982, the Commission advised BN by letter, a copy of which is attached to this Complaint as Exhibit B, that it had determined the fair cash value of BN's property subject to ad valorem taxation in the State of Oklahoma for the 1982 tax year to be \$126,194,733.00. This estimate of BN's Oklahoma system value was based upon a full system value of BN of \$3,574,921,544.00 (an increase of \$1,467,600,344 over BN's 1981 full system value) and an allocation factor of 3.53%. The Commission further advised BN that it had submitted to the State Board for its consideration a proposed assessment of BN's property for the 1982 tax year of \$13,717,367.00. This proposed assessment was based upon an assessment percentage or ratio of 10.87%. The Commission recommended reduction in BN's assessment ratio from 19% to 10.87% in order to give the appearance of complying with the requirements of Section 306.

29. On May 19, 1982, the State Board accepted the results of the sales assessment ratio study conducted by the State of Oklahoma and ordered that the taxable property of railroads operating in Oklahoma be assessed for the 1982 tax year at an assessment ratio or percentage of 10.87% of fair cash value.

30. On May 21, 1982, the State Board notified BN by letter, a copy of which is attached to this Complaint as Exhibit C, that the State Board had determined the fair cash value of BN's property subject to ad valorem taxa-

tion in the State of Oklahoma to be \$126,194,733.00 and that it had assessed BN's property for the 1982 tax year at \$13,717,367.00. This assessment was identical to that recommended by the Commission and was based upon a full system value of BN of \$3,574,921,544.00, an allocation factor of 3.53%, and an assessment percentage or ratio of 10.87%.

31. On May 27, 1982, BN filed with the State Board a timely protest of the State Board's assessment of its property for the 1982 tax year.

32. On May 21, 1982, the State Board's assessment of BN's property was certified by the State Auditor and Inspector to the county assessors of each county in the State of Oklahoma in which BN operates.

33. On December 23, 1982, BN paid under protest the first installment of its 1982 ad valorem taxes based upon the State Board's 1982 assessment. The second installment of BN's 1982 ad valorem taxes is due April 1, 1983.

#### BN's SECTION 306 CLAIM

34. The true and correct full system value of BN's property as of January 1, 1982, is \$1,495,253,000.00. Utilizing the Commission's and the State Board's allocation factor of 3.53%, the true market value of BN's system property allocated to the State of Oklahoma should have been \$52,782,430.00. Utilizing the Commission's and the State Board's assessment percentage or ratio of 10.87%, BN's assessment in the State of Oklahoma for the 1982 tax year should have been no greater than \$5,737,450.00.

35. The full system value determined by the Commission and the State Board (\$3,574,921,544.00) exceeds the true market value of BN's system property (\$1,495,253,000.00) by \$2,079,668,544.00 or 139%. Similarly, the value of BN's system property allocated to the State of Oklahoma by the Commission and the State Board (\$126,194,733.00) exceeds the true market value of such property (\$52,782,450.00) by \$73,412,283.00, or 139%.

The ratio of assessed value (\$13,717,367.00) to true market value (\$52,782,450.00) of BN's property in the State of Oklahoma for the 1982 tax year is 26% ( $\$13,717,367.00 \div \$52,782,450.00$ ), not 10.87%.

36. Although the Commission and the State Board gave the appearance of complying with Section 306 by fixing a 1982 assessment percentage or ratio for BN of 10.87%, they in fact valued BN at a value far in excess of true market value and assessed BN at a far higher ratio of assessed value to true market value than 10.87%.

37. BN's assessment in the State of Oklahoma for the 1982 tax year (\$13,717,367) exceeds the correct and lawful assessment of its property (\$5,737,450) by \$7,979,917. Thus, 58.17% of BN's assessment for the 1982 tax year ( $\$7,979,917 \div \$13,717,367$ ) is excessive and unlawful and 58.17% of the ad valorem taxes levied against BN's property for the 1982 tax year in Oklahoma are excessive and unlawful under Section 306.

38. BN's system property subject to valuation and assessment by the State Board for ad valorem tax purposes is "transportation property" within the meaning of Section 306.

39. For the 1982 tax year, the ratio of assessed value to true market value of commercial and industrial property in the State of Oklahoma is no greater than 10.87%.

40. The ratio of assessed value to true market value of BN's transportation property in the State of Oklahoma for the 1982 tax year (26%) exceeds the ratio applicable to other commercial and industrial property (10.87%) by more than 5%.

41. The Defendants' failure and refusal to reduce the full system value which forms the basis of BN's assessment, and the Defendants' failure and refusal to reduce BN's ratio of assessed value to true market value from 26% to 10.87%, result in a ratio of assessed value to true market value for BN that exceeds the ratio of assessed value to true market value for commercial and

industrial property in the State of Oklahoma for the 1982 tax year and violate Section 306.

42. Unless the Defendants, and those in active concert and participation with them, are enjoined from levying or collecting ad valorem taxes that are based upon such illegal assessments, BN will be obligated to pay excessive ad valorem taxes wrongfully assessed in violation of Section 306.

43. BN is entitled to a judgment pursuant to 28 U.S.C. § 2201 declaring that its property may not be assessed at a higher ratio of assessed value to true market value than 10.87% and that the Defendants, and those in active concert and participation with them, may not levy or collect ad valorem taxes based upon such excessive assessments.

44. WHEREFORE, BN prays that this Court:

1. Issue a preliminary and permanent injunction prohibiting the Defendants, and those in active concert or participation with them, from levying or collecting the second installment of ad valorem taxes from BN for the 1982 tax year;

2. Issue a permanent injunction directing the defendants, and those in active concert or participation with them, to refund, or to credit toward future tax years, the excessive and unlawful portion of those 1982 ad valorem taxes paid under protest by BN as part of its first installment on December 23, 1982 (i.e. 8.17% of BN's total 1982 ad valorem tax liability as determined by the Defendants);

3. Issue a declaration declaring that the Defendants, and those in active concert or participation with them, have assessed BN's property for ad valorem tax purposes for the 1982 tax year at a ratio of assessed value to true market value in excess of 10.87% and that the Defendants, and those in active concert or participation with them, may not levy or collect ad valorem taxes for the 1982 tax year based upon such excessive assessments.

34a

EVERETT B. GIBSON  
JAMES W. McBRIDE  
GREGORY G. FLETCHER  
LAUGHLIN, HALLE, CLARK,  
GIBSON & McBRIDE  
Suite 1101  
1700 K Street, N.W.  
Washington, D.C. 20006  
  
PIERSON, BALL & DOWD  
Suite 1310, First  
Oklahoma Tower  
210 West Park Avenue  
Oklahoma City,  
Oklahoma 73102

By: /s/ Michael Minnis  
MICHAEL MINNIS

#### VERIFICATION

STATE OF MISSOURI  
COUNTY OF GREENE

T. C. Wehner, having been first duly sworn, states that he is the Manager, Property Tax, of the Burlington Northern Railroad Company, plaintiff in this case; that he has read the foregoing complaint and that the facts stated therein are true to the best of his knowledge, information and belief.

/s/ T. C. Wehner  
T. C. WEHNER

Sworn to and subscribed before me this 28th day of February, 1983.

s// William J. Graham  
WILLIAM J. GRAHAM  
Notary Public

My Commission Expires:  
March 8, 1985

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[EXHIBIT A, Consisting of Text of Section 306,  
Omitted in Printing]



36a

EXHIBIT B

[SEAL]

Odie A. Nance, Chairman  
Robert L. Wadley, Vice-Chairman  
J. L. Merrill, Sec'y-Member

OKLAHOMA TAX COMMISSION  
STATE OF OKLAHOMA  
2501 Lincoln Blvd.  
Oklahoma City, Oklahoma 731940001

May 6, 1982

Burlington Northern Railroad Company  
T. C. Wehner, Land and Tax Comm.  
3253 East Chestnut Expressway  
Springfield, MO 65802

Gentlemen:

In a previous communication directed to you by Lewis H. Bohr, Director of our Ad Valorem Tax Division, you were advised that you would not receive a notice this year from the Oklahoma Tax Commission regarding acceptance of or a proposed change in your 1982 ad valorem assessment return. For the purpose of filing a protest or asking for a conference, this still holds true.

However, we believe you should have knowledge of the findings which we have already presented to the State Board of Equalization so you will be aware of the character of the data pertaining to your 1982 assessment with which the Board will be working when it meets to set the 1982 assessed values for your company and others. After the Board meets and sets the values, it will mail to you its official notice, and that will start the statutorily prescribed protest period.

Accordingly, for informational purposes only, and based upon our determined fair cash value for your taxable

37a

property of \$126,194,733 and an applied assessment ratio of 10.87%, the proposed assessed value before penalty, if any, on your taxable property which has been submitted to the State Board of Equalization for its consideration is \$13,717,367.

No reply to this correspondence is required or expected, since it does not constitute official notice.

Sincerely,

/s/ Odie A. Nance  
ODIE A. NANCE  
Chairman

/s/ Robert L. Wadley  
ROBERT L. WADLEY  
Vice-Chairman

/s/ J. L. Merrill  
J. L. MERRILL  
Secretary-Member

JLM:jr

38a

EXHIBIT C

[SEAL]

STATE BOARD OF EDUCATION  
111 State Capitol Building  
Oklahoma City, Oklahoma 73105  
(405) 521-3016

Gov George Nigh  
Chairman  
Tom Daxon  
Secretary

Dina L. Reese  
Administrative  
Assistant

May 21, 1982

Burlington-Northern Railroad Company  
T. C. Wehner, Land and Tax Commissioner  
3253 East Chestnut Expressway  
Springfield, Missouri 65802

Gentlemen:

At a meeting of the State Board of Equalization, held at the State Capitol, Oklahoma City, Oklahoma, on May 19, 1982, your Oklahoma property, subject to ad valorem taxation, was assessed for 1982. Based upon a fair cash value of \$126,194,733, and using a ratio of 10.87%, your assessed valuation for 1982, including penalty, if any, is \$13,717,367.

In accordance with the provisions of 68 O. S., 1971, Section 2466, this amount will stand as final assessment unless written protest is filed by you with the Secretary of this Board within ten (10) days from the date of this notice. This protest must specify your " \* \* grievances and the pertinent facts in relation thereto in ordinary and concise language and without repetition in such a manner as to enable a person of common understanding to know what is intended."

Should you desire a hearing before the State Board of Equalization regarding the assessed valuation of your

39a

property, a date will be fixed for same upon receipt of your complaint, and you will be duly notified of such date.

Sincerely,

/s/ Tom Daxon  
TOM DAXON  
State Auditor and Inspector  
and  
Secretary, State Board of  
Equalization

TD/dld

40a

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-83-419-R

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*

v.

OKLAHOMA TAX COMMISSION; ODIE A. NANCE, Chairman  
of the Oklahoma Tax Commission; ROBERT T. WADLEY,  
Vice-Chairman of the Oklahoma Tax Commission;  
J. L. MERRILL, Secretary-Member of the Oklahoma Tax  
Commission; STATE BOARD OF EQUALIZATION OF THE  
STATE OF OKLAHOMA; GEORGE NIGH, Chairman of the  
State Board of Equalization of the State of Oklahoma;  
SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIF-  
TON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN,  
Members of the State Board of Equalization of the  
State of Oklahoma,

*Defendants.*

[Filed Nov. 9, 1983]

AMENDMENT TO COMPLAINT

Pursuant to leave of Court granted by an order filed  
herein on November 3, 1983, the plaintiff, Burlington  
Northern Railroad Company (BN), hereby amends its  
complaint in this action by adding the following sentence  
to paragraph 41 of the complaint:

"BN alleges that the defendant, in valuing BN's  
property for the 1982 tax year, purposely overvalued  
BN's property with discriminatory intent".

41a

Respectfully submitted.

Everett B. Gibson  
James W. McBride  
Gergory G. Fletcher  
LAUGHLIN, HALLE, CLARK,  
GIBSON & MCBRIDE  
1700 K Street, N.W.  
Suite 1101  
Washington, D.C. 20006

PIERSON, BALL & DOWD

By /s/ David Machanic  
DAVID MACHANIC  
MICHAEL MINNIS  
1310 First Oklahoma Tower  
210 West Park Avenue  
Oklahoma City, OK 73102  
(405) 235-7686  
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that on this 9 day of November,  
1983, a true and correct copy of the above and foregoing  
Amendment to Complaint was mailed, postage prepaid,  
to:

Oklahoma Tax Commission  
Office of General Counsel  
Larry Blankenship, Esq.  
Gary W. Gardenhire, Esq.  
Donna E. Cox, Esq.  
Room 1 - 35

2501 Lincoln Building  
Oklahoma City, Oklahoma 73104

ATTORNEYS FOR THE OKLAHOMA TAX COMMISSION  
and ODIE A. NANCE, ROBERT T. WADLEY, and J. L.  
MERRILL, Individual Members of the Oklahoma  
Tax Commission;

and,



Office of the Attorney General  
 State of Oklahoma  
 James B. Franks, Assistant Attorney General  
 112 State Capitol Building  
 Oklahoma City, Oklahoma 73105

ATTORNEYS FOR THE STATE BOARD OF EQUALIZATION  
 OF THE STATE OF OKLAHOMA and GEORGE NIGH,  
 SPENCER BERNARD, LEO WINTERS, JACK CRAIG,  
 CLIFTON SCOTT, DR. LESLIE FISHER and MIKE  
 TURPEN, Individual Members of the State Board  
 of Equalization of the State of Oklahoma.

/s/ Michael Minnis  
 MICHAEL MINNIS

IN THE UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF IOWA  
 CENTRAL DIVISION

Civil No. 83-100-A

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*

vs.

GERALD D. BAIR, Director of the  
 Department of Revenue of Iowa,  
*Defendant.*

[Filed July 16, 1986]

ORDER

The above-entitled matter is before this Court upon remand from the Eighth Circuit Court of Appeals.

Plaintiff filed this action March 2, 1983, contending that the property tax system of the State of Iowa discriminated against it three ways in violation of section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat., 31, 54 (codified at 49 U.S.C. § 11503). This Court found in favor of plaintiff on one issue holding that fifty percent of the plaintiff's property was personal and should be taxed in the same manner as all other personal property in Iowa. 584 F. Supp. 1229 (S.D. Iowa 1984). The claim that in certain years Iowa assessed all of Burlington Northern's property well in excess of its true market value was dismissed. On March 15, 1985, the Court, in an unreported ruling and order, by applying the arbitrary and capricious standard, held in favor of the de-

fendant on plaintiff's claim that Iowa assessed most other commercial and industrial property at a much lower percentage than Burlington Northern's property.

In *Burlington Northern Railroad Company v. Bair*, 766 F.2d 1222, 1226 (8th Cir. 1985) the Court of Appeals held that this Court erred:

(1) in aggregating Burlington Northern's real and personal property in its section 306(1)(a) analysis; (2) by imposing an improper burden of proof; and (3) in failing to make findings of fact on assessment values and true market values.

On remand, no additional evidence was taken, briefing has been completed and the case came on for oral arguments June 23, 1986. Before the Court is Burlington Northern's claim under section 306(1)(a), 49 U.S.C. 11503(b)(1), (c), for proper equalization asserting that the ratio of assessed value to true market value of Burlington Northern's real property exceeds the ratio of assessed value to true market value of all other commercial and industrial real property by at least five percent. This claim is based on *de facto* discrimination. Iowa law does not contain different assessment rates, but Burlington Northern claims that the tax system operates in such a manner as to discriminate against it.

Defendant's original brief on remand quoted a considerable portion of this Court's March 15, 1985, Ruling and Order and argued that the court had previously made the factual findings required by the Eighth Circuit Court of Appeals and that nothing in the circuit opinion required alteration. The Court does not agree. In reviewing the same seven errors urged here, the Court merely found that the Department did not act arbitrarily or capriciously in using the methodology it did. The Court did make some further findings of fact. The Court will not treat them as the law of the case, but will reconsider such findings in the light of further argument and the

change in the burden of proof to be used. A closer examination is called for when the Court must determine the preponderance of the evidence, rather than decide whether the conduct of the defendant was arbitrary or capricious.

In order to make the comparison for equalization purposes under section 306(1)(a), the district court must make findings of fact on: (1) the assessed value of plaintiff's property; (2) the true market value of plaintiff's property; (3) the assessed value of all other commercial and industrial property in the same assessment jurisdiction; and (4) the true market value of all such other commercial and industrial property. The district court must calculate the two ratios and determine whether they vary by at least five percent.

*Burlington Northern Railroad Company v. Bair*, 766 F.2d 1222, 1226 (8th Cir. 1985).

Because of the unique nature of railroad operating property, Iowa, like most states, values it for ad valorem tax purposes as a unit. The unit concept is based on the principle that the operating property derives its true value, not from the sum of its parts, but from the integrated use of all of such property to carry traffic, generate income and render public service. As railroads are rarely sold as operating units, comparable sales are unavailable and other methods must be used to attempt to arrive at the value of the operating property of the railroad. Accepted methods are (1) the capitalized earnings method (income method); (2) the stock and debt method; and (3) the depreciated cost method.

The parties do not quarrel about the use of the unit concept nor is there disagreement over the percentage of railroad operating property allocated to Iowa. They also agree on the above methods of evaluation, but differ over the way each method should be applied in attempting to value railroad operating property.

The Court will begin its analysis by considering the most difficult and complex of the four factors upon which findings of fact must be made.

### TRUE MARKET VALUE OF PLAINTIFF'S PROPERTY

Burlington Northern contends the Department has made seven significant errors in its valuation process as follows:

- A. In weighting the three accepted methods of determining market value.
- B. In the income method:
  1. in forecasting earnings,
  2. in its treatment of current deferred federal income taxes;
  3. in its treatment of current liabilities.
- C. In the stock and debt method:
  1. in the determination of common equity,
  2. in the treatment of current liabilities,
  3. in the treatment of accumulated deferred federal income taxes.

In attempting to arrive at the true market value of Burlington Northern's real property, the Court will use as a starting point, The Appraisal Report of the Operating Properties of Burlington Northern Railroad by the Iowa Department of Revenue for January 1, 1981 and January 1, 1982 (exhibits CC and DD). The Court will then discuss each of the claimed errors and arrive at the principles to govern the determination of market value of the plaintiff's for the operating property years in issue.

- A. *In weighting the three accepted methods of determining market value.*

In arriving at their opinions as to the unit value of plaintiff's transportation property, the parties gave the three methods referred to above the following weight:

Method	Plaintiff	Defendant
Income	50%	30%
Stock and Debt	50%	60%
Depreciated cost	0%	10%

The depreciated cost method presumes that the value of railroad system property is equal to its original cost less recorded depreciation and estimated obsolescence. It is primarily an accounting procedure. Any relationship between depreciated cost and value would be coincidental. Mr. Nicholson, the Supervisor for Central Assessment for the State of Iowa, testified that "the cost approach in no way or in very little respects would indicate market value." The Court holds that the Department erred in giving the depreciated cost method any weight under the circumstances of this case.

The income approach attempts to arrive at the fair market value of the railroad's transportation property by capitalizing the income generated by the railroad as an operating unit. Here the parties have agreed as to the appropriate rate of capitalization but have substantial differences as to the proper stream of income to be used in the computation.

The stock and debt method utilizes the railroad's outstanding debt and the equity in all of its securities. The theory is that the true market value of the asset side of the balance sheet is arrived at by properly valuing the debt and equity side of the balance sheet. The parties have significantly different opinions as to the proper way to use the stock and debt method.



Both methods require the exercise of considerable judgment on the part of the appraisers. The Court does not believe that either is preferable. The Department erred in giving more weight to the stock and debt method than the income method. The income method is the most direct measure of the investor's or buyer's interest. Prospective buyers of stock or the system are not interested in the railroad property as such, but in the income that an investment in that property will generate.

The Court holds that the plaintiff has established by a preponderance of the evidence that in determining the unit value of plaintiff's operating property, the income method and the stock and debt method should be weighted equally and that the cost method should not be used.

*B. In the use of the income method.*

*B-1. In forecasting earnings.*

In the income approach, plaintiff used the average of its computation of the operating income of Burlington Northern for the last five years on the theory that this method leveled out the extra-ordinary large items in the income stream and minimized the distortions associated with investment tax credits. The Department uses plaintiff's current year's income from operations to forecast plaintiff's income for the next year. Although the Department's use of current earnings may cause the projected income to fluctuate more from year to year, there was no showing that over the years plaintiff would be prejudiced. Very few railroad appraisers use the five year income average. The evidence has shown that the operating income of Burlington Northern has risen substantially over the last several years and its president expects the trend to continue. This evidence, coupled with the general long term inflationary trend, persuades the Court that the use of the current year's operating income to forecast the next year's income is more appropriate. Use of the five year average would result in

a consistent underestimation of plaintiff's earnings for the next year, and consequently undervalue plaintiff's transportation property. If the trend should reverse and the operating income decrease, the plaintiff would have the immediate advantage of the effect of that decrease on the next years evaluation.

Plaintiff has failed to establish by a preponderance of the evidence that the defendant erred in using the current year's operating income to forecast the income to be capitalized under the income method.

*B-2. In treating deferred taxes.*

For book and financial reporting purposes railroads use the straight-line method of computing depreciation prescribed by the I.C.C. However, in order to stimulate investment in new assets, federal tax laws permit taxpayers to depreciate certain assets for tax purposes at a faster rate in the early years of an asset's life and at a slower rate in the later years. Regardless of whether accelerated or straight-line depreciation is used, total depreciation cannot exceed the cost of the asset. Conceptually, the use of accelerated depreciation for federal income tax purposes simply defers payment of a portion of a taxpayer's ultimate federal income tax liability. Publicly held companies, including railroads, are required to report the total tax expense attributable to pre-tax earnings, but divide the total tax between that which is currently payable under federal law and that which is deferred.

In arriving at its forecast of plaintiff's operating income, the Department allowed only the taxes currently paid as a deduction and did not consider 50 million dollars of deferred taxes as an expense. This method increases the market value of the transportation property by 250 million dollars. The plaintiff treats deferred taxes as they are treated under Generally Accepted Accounting Principles (GAAP) and ICC Regulatory Accounting

and does not add the deferred tax expense back into the amount of income to be capitalized. Plaintiff's position is supported by the only three reported cases, *In re Southern Railway Co.*, 329 S.E.2d 235 (N.C. 1985); *Southern Railway Co. v. State Board of Equalization*, 682 S.W.2d 196 (Tenn. 1984); *Pacific Power & Light Co. v. Department of Revenue*, 496 P.2d 912 (Ore. 1979). This Court takes a different view.

Mr. Nicholson, the Supervisor of Central Assessment for the State of Iowa testified that studies show that deferred taxes are not paid back because for capital-intensive companies, they either grow or are constant. See Davidson, Kirsch & Palast, *What Others Think, Utilities Accelerated Depreciation and Income Tax Allocation: An Empirical Study*. Public Utilities Fort-nightly-July 2, 1981. He concluded that investors are aware of this additional source of capital and therefore he included deferred taxes in arriving at the railroad's income stream. (Tr. 648-649)

The Court is of the opinion that the assumption that deferred taxes will continue to grow and actually will never be paid back is supported by the studies and logic. If deferred taxes are not added into the income stream, the plaintiff would have an increased flow of capital that would not be capitalized. On the other hand, if investments would be less than the depreciation, a negative deferred tax situation would develop where more taxes were actually being paid than would have been paid under the straight-line method, plaintiff's income would be reduced by that amount and the property value lowered accordingly. As it appears that a consistent underestimation of operating income will probably develop if it is not determined by taxes actually paid, and as there would be no prejudice over the long run to plaintiff if deferred taxes are not treated as an expense in arriving at income, the Court believes that the plaintiff has failed to establish by a preponderance of the evi-

dence that the defendant erred in computing operating income by using taxes actually paid and not treating deferred taxes as an expense.

However, for the period of time involved, there is an extraordinary item of deferred taxes that does not fit within the above analysis. Beginning in 1981, the Internal Revenue Service (IRS) permitted railroads to write off the undepreciated base in their track accounts over a five year period. Burlington Northern elected to use an accelerated depreciation method. In 1981, this IRS regulation created a deduction of \$400,000,000 and reduced income taxes by over \$192,000,000. No additional money was invested. The IRS just permitted a shorter period to write off investments previously made. Deferred taxes were created by the difference between the deduction allowable under the double declining balance method and the straight-line method. These deferred taxes are not within the courts justification for the use of taxes actually paid. The railroad did not invest any additional capital. It just accelerated the depreciation on previous investments in track and roadbed. The deferred taxes on this item should not be added back into the income stream.

The Court holds that the plaintiff has not shown by a preponderance of the evidence that the Department erred in its treatment of deferred taxes except to the extent that it included therein the extraordinary item discussed above.

### *B-3. In treating current liabilities.*

One of the Department's expert witnesses, Dr. Martin Gruber, added current liabilities into the value arrived at under the income method. Neither Dr. Schoenwald nor Mr. Nicholson did so. Current liabilities were not used in the final calculations of the Department under the income method. As the Court has used such calculations as a starting point and examined them with respect



to the errors urged by plaintiff, the Court need not determine whether Dr. Gruber's add-on of current liabilities is improper. Defendant does not urge that this add-on should be made. If a determination were required, the Court would find that current liabilities should not be added.

Plaintiff has established by a preponderance of the evidence that it is not proper to adjust the income stream to reflect terms of current liabilities.

*C. In the stock and debt method.*

The stock and debt approach to value is based upon the premise that the aggregate market value of a company's outstanding stock and debt reflects the market value of the company's assets. Plaintiff challenges the Department's (1) determination of the value of Burlington Northern's common equity; (2) treatment of current liabilities; and (3) treatment of deferred taxes.

*C-1. Valuation of the railroad's common equity.*

As Burlington Northern Railroad is a subsidiary of a holding company, Burlington Northern Inc (BNI), which also includes companies engaged in oil and gas exploration and production, forest products, coal and other minerals, land, trucking and air freight, there is no public trading in the stock of Burlington Northern Railroad as such. Only BNI's stock is publicly traded. In attempting to determine the market value which investors purchasing BNI's stock have placed on the operating railroad properties one must separate the railroad stock from that of the other subsidiaries. An investor would, in purchasing BNI stock consider the income streams and risks attributable to each of these major affiliates and the potential of each in terms of dividends or growth, quality of earnings, the industry involved, the risk of such a company and its relationship to the total assets of the holding company.

In its final computations, the Department arrived at the market value of the equity in Burlington Northern by multiplying the market value of the equity in BNI—a known figure—by the ratio of the book value of investment in the railroad operating property to the book value of the investments in BNI. (89.42%). The Department's expert Dr. Gruber arrived at the market value of the equity in Burlington Northern by multiplying the total equity of BNI "by the ratio of total income available to equity of the rail subsidiary to the income available to the equity of the holding company." (EE p. 7)

The most that can be said for these techniques is that they are simple and objective. The Court has already stated that depreciated cost has little or no relationship with value. Book value as used here is equally worthless. As pointed out above an investor takes many factors in addition to income into consideration in determining the market value of a stock. Reliance on one factor could seriously distort the market value an investor would place on the stock of the railroad subsidiary. For instance, BNI owns the largest coal reserves in the United States except for the government. Those reserves would contribute significantly more to the equity value of BNI than the limited income from the coal properties. The Court believes the simplistic methods urged by the Department fail to properly account for the fundamental variances among BNI's various holdings, and fails to consider other factors that can influence an investor's opinion as to the market value of stock.

The price/earnings (P/E) multiple used by Dr. Schoenwald and Mr. Batkin, expert witnesses for plaintiff, reflects an investor's total interest in a stock including risk, growth, earnings, as well as other factors that may apply to a particular industry and a specific company. Lehman Brothers, of which Mr. Batkin is a managing director, was asked to "determine the average market value which investors would have placed on the net assets



of the non-rail properties of Burlington Northern Inc. during the calendar year 1981." Lehman used indices of companies that it determined were in comparable businesses with each of the various BNI subsidiaries. With the exception of the coal and mineral business, Lehman used the average price/earnings multiple for 1981 for the companies selected as comparable. The estimated market value for the coal and mineral business was valued at 2¢ a ton for 15 billion tons of reserve-or \$300,000,000.

Sometime later Lehman used a similar technique to arrive at P/E ratios to be applied to the BNI railroad property. By using the six major railroad systems in the country, Lehman arrived at a P/E multiple of 8.4. By eliminating Union Pacific which received almost one-half of its earnings from gas and oil, the P/E ratio dropped to 6.3. Norfolk and Southern, which was a well respected almost pure railroad, had a P/E ratio of 6.1. Because Burlington Northern was not viewed by Lehman as being of an equally high quality, Lehman used the P/E ratio of 5 as an approximation for this railroad.

Dr. Schoenwald applied a P/E ratio of 14 to the income derived from all of BNI's non-railroad subsidiaries, relying on Standard & Poor's security analyst handbook, and applied a P/E ratio of 4 to the railroad operating income "since railroad income is valued relatively poorly and since BN had performed more poorly than other railroads."

The evidence convinces the court that the best way to determine the market value investors would place on the Burlington Northern railroad property in deciding whether to purchase BNI stock is by the application of the appropriate P/E ratio to the income derived from the railroad operation and each of the other subsidiary operations individually. It would be highly unlikely that the total of such estimated market values would equal the actual market value of BNI common equity, a known

figure, as it is publicly traded. It therefore appears that a further calculation is required. The total value that has been computed should be compared with the market value of BNI common equity and the common equity of the railroad property increased or decreased by the percentage of difference.

Having determined the most appropriate method to arrive at the market value of the railroad's common equity, under the opinion of the Circuit Court of Appeals, the Court must now determine the appropriate P/E ratio to be used in arriving at the value of the common equity of the railroad property and each of the subsidiaries of BNI. The Court agrees with the classification of BNI's non-rail subsidiaries found in Exhibit I to Plaintiff's Exhibit 19. The Court understands that there is no dispute over the income stream assigned to each of the subsidiaries. The Court also accepts the 2¢ per ton value for coal reserves as a proper valuation for the coal and mineral business.

The selection of the appropriate P/E ratio is a crucial decision in the evaluation process. Although concrete figures are used, subjective judgment is necessary in deciding what companies to use as comparables and where to place Burlington Northern in the comparison with those companies to arrive at the appropriate P/E ratio. Had the Department used the method approved by the Court, considerable deference would have been accorded the expertise used in determining comparable companies and the proper place the specific BNI subsidiary occupied in relation to those companies and their established P/E ratios. As the Department used other techniques not approved by the Court, the Court must determine from the evidence the P/E ratio to be applied to each BNI subsidiary including the railroad for the years in issue.

The Court accepts as comparable the companies used by Lehman and listed in Plaintiff's Exhibit 19. (All subsidiaries except the railroad and coal and mineral.)

However, as most of them are considerably larger than the comparable BNI subsidiary and are leaders in the particular industry, the court believes that the application of the average P/E ratio of those companies to BNI subsidiaries would tend to inflate the market value of the common equity of the BNI subsidiary. Rather than being in the middle of the group the court is of the opinion that the BNI subsidiary would more likely be in the bottom third. Therefore in computing the appropriate P/E ratio to be used in determining the market value of the common equity of each BNI subsidiary, the selected comparable companies may be used, but the P/E ratio should be set at the lower  $\frac{1}{3}$  level rather than in the middle of the group. Although Exhibit 19 relates to 1981 only, the P/E ratios established by use of this exhibit may also be applied to 1982.

The P/E ratio to be applied to the railroad operating income is 5.5 to 1. Dr. Schoenwald's multiple of 4 is not acceptable. Lehman's discount of the P/E ratio for operating railroads to 5 for the performance of Burlington Northern is not justified under the evidence. While its operation does not equal that of the most efficiently operated lines, a lowering of the P/E ratio to 5.5 sufficiently incorporates its lesser performance.

In this area the Court has attempted to provide the principles, methods and, where necessary, the specific figures that will enable the parties to use their expertise to compute the market value of the common equity prospective investors would attribute to each of BNI's subsidiaries. The figures for the subsidiaries, including the railroad property, should be totalled and compared with the known market value of the common equity of BNI. The market value of the common equity of the railroad property should be increased or decreased in proportion to the difference.

### *C-2 In the treatment of current liabilities*

The Department, in attempting to arrive at the value of the railroad operating property by the stock and debt method, included net current liabilities<sup>1</sup> on the righthand side of the balance sheet. The railroad included current liabilities, but also deducted current assets which exceed current liabilities by approximately \$200,000,000. The different treatment of current assets and liabilities accounts for an evaluation difference of \$912,000,000.

The Court is unable to understand how either of the above methods is very helpful in attempting to arrive at the unit value of the railroad operating property. If the Department's method is accepted, you arrive at a total for the asset side of the balance sheet which includes current assets, like accounts receivable which do not contribute to the operating income and should not be included in the unit valuation procedure. In addition, the higher the amount of current liabilities outstanding, the higher the unit value of railroad operating property when there does not appear to be any rational relationship between the two figures. If the railroad's method is adopted, the higher the ratio of current assets to liabilities, the less valuable the railroad operating property as a unit, because, under the railroad's approach, the value is decreased by the excess of current assets over liabilities. Neither method makes much sense to the Court and the results seem unrelated and incongruous.

In its post trial memorandum, the railroad argues as follows:

Mr. Nicholson and Dr. Gruber simply add current liabilities to the gross stock and debt value of the

<sup>1</sup> Current liabilities	788,318,000
Equipment obligations and other [longterm debt] due in one year	(76,296,000)
	<hr/> 712,022,000



company. Dr. Schoenwald, on the other hand, nets current liabilities with current assets to get something akin to a net working capital amount.

The working capital position of any company is a function of its production cycle, which is the period from the purchase of raw materials through the conversion into salable goods and the billing process until the collection of the receivable. Although the cycle takes different forms in different businesses, the longer it is—the greater the burden. Thus, a company with high current liabilities and high current assets is not more valuable with all other things being equal. Therefore, only the net working capital position is relevant to the valuation process.

Perhaps a more dramatic illustration would involve 100 persons each of whom owed \$100 to another person and was owed \$100 by another party. Under the balance sheet identity of the Stock and Debt Approach, the \$100 liability would create the appearance that there was a taxable asset of \$100. Clearly, each person's net position is "zero". At a tax of \$2, the taxing authority would claim \$200 which exceeds any one of the original debts (or assets) involved in this illustration. This result is unfair and unreasonable, and simply derives from the methodology being used. It can, however, be rectified properly and easily by considering the net working capital position.

The excess of current assets over current liabilities is something "akin to net working capital". In the Court's opinion net working capital should be included in attempting to evaluate the railroad's operating property. However, the Court does not agree with the way it was used by the railroad. The railroad deducted net working capital from the stock and debt side of the balance sheet, thus lowering the value of the railroad operating prop-

erty. The Court believes that net working capital should add to the value of the operating property rather than decrease it. The Court believes this is consistent with the railroad's concept of the stock and debt method. Dr. Schoenwald testified:

This method assumes that the value of taxable property may be determined by summing the market value of all of a company's outstanding securities, plus the value of leased equipment and other obligations, *less a deduction for non taxable assets.* (Emphasis added.)

Although net working capital is not property directly subject to real estate taxes, it does contribute toward the operating income flow of the railroad and should be included when the unit value method is being used. To deduct all of the current assets would confuse the valuation of particular assets with the unit method and would not be proper. By including working capital as contributing to the income flow, you have in effect deducted non-taxable assets. If you limit operating railroad property to just real and personal property and eliminate working capital as contributing to the stream of income from operations, you are departing from the unit value method of arriving at the value of railroad operating property and turning to the valuation of property as such.

Other than the railroad's reference to the working capital, the Court has found nothing in the filings of either party that would tend to support the Court's above analysis and conclusion. This result certainly does not adhere to the Department's view of the stock and debt method. While the Court found some comfort in the railroad's language, the Court's treatment of net working capital is opposite to the way the railroad treated working capital. It may very well be that the Court's lack of expertise in this area has caused the Court to take an erroneous approach to this important issue. However, when one keeps in mind that we are here trying to arrive



at the unit value of the railroad's operating property for purposes of taxation, rather than the total asset value for the sale or purchase, the method adopted by the Court seems most appropriate. The primary question is whether the Court is correct in treating net working capital as contributing to the stream of income from operations. If the Court is correct, net working capital is properly includible in arriving at the unit value of the railroad's operating property.

The Court finds that in valuing railroad property as a unit under the stock and debt method, current liabilities should be deducted from current assets and the resulting figure, approximating working capital, if positive, should be added to the remaining elements on the right hand side of the balance sheet. If negative, it should be deducted.

### *C-3 Treatment of accumulated deferred income taxes*

In its stock and debt approach the Department adds to the aggregate market value of the railroad's securities the amount of accumulated deferred federal income taxes. The railroad takes the position that the value of these deferred taxes is already reflected in the market value of the securities. The Court agrees with the plaintiff.

The Court has adopted the price/earnings ratio as the proper way to value a company's equity under the stock and debt approach. That method presupposes that the price of a stock reflects its income-earning potential. Deferred taxes have some value to the company. In determining the appropriate P/E multiple to be used in determining the market value of the common equity, the Court gave consideration to the accumulated deferred federal income taxes. The Department's expert Dr. Gruber testified that there is considerable debate as to whether accumulated deferred federal income taxes should be included under the stock and debt approach. In order to be conservative he, like Dr. Schoenwald, did not add deferred taxes into his evaluation.

The Court finds that the plaintiff has established by a preponderance of the evidence that deferred federal income taxes are reflected in the market value of the securities and that they should not be included as a separate item under the stock and debt method.

The Court has attempted to consider all of the claims of the plaintiff relating to the railroad's true market value and to furnish all the principles and specific figures the parties will need in order to compute the true market value of the real property that is a part of the plaintiff's railroad operating property. The parties by utilizing their expertise can make the necessary computations with greater accuracy and ease than the Court. If the Court has not made all findings that are required, the parties can so inform the court.

### ASSESSED VALUE OF BURLINGTON NORTHERN'S REAL PROPERTY

A pre-trial stipulation contained the final assessments on Burlington Northern according to the records of the Department. Mr. Nicholson testified at trial that certain errors in the final assessment were pointed out during discovery and that corrections had been made, all favoring the railroad. As an injunction has been in effect, recertification awaits a final determination of the court. The corrected assessment has been used by the parties. At the trial, the parties agreed that these corrected figures would be binding for these particular tax years.

The Court therefore finds that the assessed value of plaintiff's real property in Iowa is \$34,105,774 for 1981 and \$33,373,092 for 1982.

### THE ASSESSED VALUE OF ALL OTHER COMMERCIAL AND INDUSTRIAL PROPERTY IN THE SAME ASSESSMENT JURISDICTION

The parties have stipulated as to the assessed value of (1) locally assessed commercial and industrial prop-

erty for 1981 and 1982; (2) locally assessed property, traditionally considered as personal property taxed in Iowa as real property for 1981 and 1982; and (3) the total appraised value of all utilities, except railroads, for 1981 and 1982. The parties disagree as to which stipulated figures should be included as components in the right hand side of the formula:

Assessed Value of Rail Transportation Property	Assessed Value of All Other Commercial and Industrial Property
Must Not Exceed by 5 per cent	
True Market Value of Rail Transportation Property	True Market Value of All Other Commercial and Industrial Property

The railroad takes the position that only commercial and industrial *real* property assessed locally and all centrally assessed utility property should be included. The Department includes, in addition, the locally assessed personal property taxed as real estate. The Court agrees with the Department.

The Eighth Circuit Court of Appeals stated on this issue:

The court cannot require Burlington Northern to extend its equalization complaint to personal property. However, in making the section 306(1)(a) ratio comparison, the court may include all other commercial and industrial property, real and personal, assessed by the Department of Revenue. Section 306(1)(a) requires comparison of property "in the same assessment jurisdiction \* \* \*." Since the Department of Revenue assesses utility properties as a unit, without differentiating between real and personal, it would be very difficult for the court to segregate the real property for purposes of comparison. And because the Department of Revenue treats personal property as real property, with no valuation

rollbacks, this comparison is not unfair. It would, however, be improper to include Burlington Northern's personal property, which is entitled to a rollback, in the ratio comparison.

*Burlington Northern R. Co. v. Bair*, 766 F.2d at 1225.

While the Court of Appeals allowed the railroad to separate out its real property on its equalization claim, it did not say that only locally assessed real property should be used. The locally assessed personal property taxed as real property must be included. As the Court of Appeals pointed out:

The relevance of classification as personal or real property for tax purposes is that personal property receives preferential tax treatment.

*Ibid.* at 1224.

Commercial and Industrial personal property taxed locally as real property does not receive the tax preference given personal property. It is taxed as real property and is a proper component of the formula. If such property is not included, you do not get a fair comparison of the properties taxed as real estate.

The Court finds that the following schedule constitutes the assessed values of properties to be used in computing the formula set forth above.

1981	100% Market Value As Assessed	§ 427A(1) Assessment Limitation Factor % <sup>2</sup>	Assessed Value
COMMERCIAL Land and Bldgs. [Comm. Real Prop.]	\$ 9,007,527,000	[87.84%]	\$ 7,912,418,000

<sup>2</sup> Under Section 441.21, Code of Iowa, the plaintiff's real rail transportation property is entitled to the assessment limitation factor applied to either commercial real property or industrial real property, depending on which is lower. For the 1981 and 1982 tax years, the plaintiff's real rail transportation property was credited with the commercial assessment limitation factor, or 87.84% in tax year 1981, and 91.63% in 1982.



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COMMERCIAL Machinery and Equip. [Comm. Per. Prop. Taxed as Real Prop.]	198,684,000	[100]	198,684,000
INDUSTRIAL Land and Bldgs. [Ind. Real Prop.]	2,047,336,000	[96.96]	1,985,136,000
INDUSTRIAL Machinery & Equip. [Ind. Personal Prop. Taxed as Real Prop.]	1,705,670,000	[100]	1,705,670,000
UTILITY PROPERTY [All Prop., Real & Per., Taxed as Real Property]	4,983,001,595	[100]	4,983,001,595
	<u>\$17,942,218,595</u>	<u>[93.55]</u>	<u>\$16,784,909,595</u>

1982	100% Market Value As Assessed	§ 427(a) (1) Assessment Limitation Factor %	Assessed Value
COMMERCIAL Land and Bldgs. [Comm. Real Prop.]	\$ 9,213,440,049	[91.63]	\$ 8,442,275,117
COMMERCIAL Machinery & Equip. [Comm. Per. Prop. Taxed as Real Prop.]	243,119,066	[100]	243,119,066
INDUSTRIAL Land and Bldgs. [Ind. Real Prop.]	2,159,675,449	[100]	2,159,675,449
INDUSTRIAL Mach. & Equip. [Ind. Per. Prop. Taxed as Real Prop.]	1,992,841,952	[100]	1,992,841,952
UTILITY PROPERTY [All Prop., Real and Per., Taxed as Real Prop.]	5,145,795,656	[100]	5,145,795,656
	<u>\$18,754,872,172</u>	<u>[95.89]</u>	<u>\$17,983,707,240</u>

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### TRUE MARKET VALUE OF ALL OTHER COMMERCIAL AND INDUSTRIAL PROPERTY

In its Ruling and Order of March 14, 1985, in discussing the true market value of all other commercial and industrial property, the Court stated:

Contract sales are expressly excluded from consideration in appraising real property values in Iowa because such sales are *deemed* not to reflect the market value of the property. See Iowa Code § 441.21 (1) (b).

P. 17 (emphasis supplied), and

The Court finds that on the evidence presented defendant's appraisals more accurately reflect one-hundred percent market value of all commercial and industrial property than does the skewed and limited sales assessment evidence presented by plaintiff. Under these circumstances the Court need not look to the sales assessment ratio data presented by plaintiff as the sole, definitive measure of the sales assessment ratio for all commercial and industrial property. See *Atchison, Topeka & Santa Fe Ry. v. Lennen*, 732 F.2d 1495, 1503-04 (10th Cir. 1984); *Ogilvie v. State Bd. of Equalization*, 492 F.Supp. 446, 451-52 (D. N.D. 1980), *aff'd*, 657 F.2d 204, 209 (8th Cir.), *cert. denied* 454 U.S. 1086 (1981).

Plaintiff has in no way shown that defendant's appraisal of all commercial and industrial property was arbitrary or capricious. The Court, therefore, concludes that defendant's appraisals of all commercial and industrial property for tax years 1981 and 1982 will be *deemed* to represent one-hundred percent of true market value.

(Emphasis supplied.)



The Court believes that the inappropriate use of "deemed" in the above quotes caused the Court of Appeals to state:

*In making findings of fact on assessed values and true market values, the district court may not rely on Iowa Code § 441.21(1) to hold that assessed values equal true market values. There is always a subjective element to valuation. While section 441.21(1) precludes de jure discrimination, there remains the possibility of de facto discrimination if, as a result of error or purpose, the assessed values vary from the true values. Section 306(2)(e), which covers the situation in which separate data for commercial and industrial property cannot be adduced, implies that the court must rely on actual evidence rather than a statutory definition such as section 441.21(1).*

(Emphasis supplied.)

This Court did not rely on the requirements of the Iowa Code that real property be value at 100% of true market value to create a presumption or even an inference that that is what the Department did. Nor did this Court intend to base its findings on the statutory definition of true market value. However, the Court does find Section 441.21(1)(b),<sup>3</sup> which defines market value

<sup>3</sup> b. The actual value of all property subject to assessment and taxation shall be the fair and reasonable market value of such property except as otherwise provided in this section. "Market value" is defined as the fair and reasonable exchange in the year in which the property is listed and valued between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and each being familiar with all the facts relating to the particular property. Sale prices of the property or comparable property in normal transactions reflecting market value, and the probable availability or unavailability of persons interested in purchasing the property, shall be taken into consideration in arriving at its market value. In arriving at market value, sales prices of property in abnormal transactions not reflecting market value shall not be

and identifies matters to be considered or not considered, is supported by other evidence and does contain an accurate and generally accepted definition. The evidence presented at trial supports the exclusion of contract sales as an abnormal sale not reflecting market value.

The Court intended to make findings of fact upon the actual evidence presented at trial. The Court finds that the sales assessment ratio studies, the only evidence presented by the railroad, does not accurately reflect the sales assessment ratio of all industrial and commercial property in Iowa because it contains many real estate contract sales, which the Court finds are abnormal sales not reflecting actual market value and because the studies are limited to urban and rural commercial real property. The defendant offered evidence tending to establish that the state has reached its goal of valuing the property at 100% of true market value. Although there is some duplication of the above findings, rather than amplify them further, the Court will include herein portions of the previous unreported Ruling and Order.

Plaintiff presented no evidence concerning the appraisal of commercial and industrial personal property; commercial and industrial personal property taxed as real property; and utility property. Instead, plaintiff presented 1981 and 1982 sales assessment ratio studies of urban and rural real property published by defendant pursuant to Iowa Code § 421.17(6), and similar sales assessment ratio data on industrial property for 1980, 1981, and 1982, to show that all commercial and industrial property is appraised at less than true market value. According to plaintiff, under section 306(2)(e) the sales as-

taken into account, or shall be adjusted to eliminate the effect of factors which distort market value, including but not limited to sales to immediate family of the seller, foreclosure or other forced sales, contract sales, discounted purchase transactions or purchase of adjoining land or other land to be operated as a unit.

assessment ratio of urban commercial real property (taken from the published studies) and the sales assessment ratio derived from the industrial data must be considered as conclusive proof that defendant appraises *all* commercial and industrial property at only approximately eighty-nine percent of true market value.

Defendant challenges the accuracy of the results from the published studies and industrial data. The sales assessment ratio study data offered by plaintiff is skewed, according to defendant, because it contains data on abnormal transactions. The published sales assessment ratio studies include data on contract sales. Contract sales are expressly excluded from consideration in appraising real property values in Iowa because such sales are deemed not to reflect the market value of the property. See Iowa Code § 441.21(1)(b). Defendant's expert testified that contract sales are not commonly considered in sales assessment ratio studies because the contract sales price does not reflect market value. The evidence shows that contract sales assessment ratios were very often lower than deed sales assessment ratios. In addition, the sales assessment ratio data on industrial property includes data on such things as sales of vacant buildings, which defendant's expert stated would not be considered in a reliable sales assessment ratio study.

Defendant also contends that plaintiff's method for establishing the sale assessment ratio of all commercial and industrial property is flawed because the sales assessment evidence offered by plaintiff concerns only commercial urban real property and industrial property. Plaintiff requests that the Court extrapolate from the data on these two classes of property to establish the sales assessment ratio for all commercial and industrial property.

The Court agrees with defendant that the sales assessment ratio evidence presented by plaintiff should not be used to determine the sales assessment ratio for all commercial and industrial property. The data presented is skewed because it includes data on transactions not reflecting true market value. The Court also does not feel that the limited data offered by plaintiff can properly form the basis for the determination of the sales assessment ratio of all commercial and industrial property.

Furthermore, plaintiff did not show that defendant's appraisal process is flawed. Defendant's experts testified that every effort is made to appraise all commercial and industrial property at one-hundred percent of market value. One of defendant's experts, Brian Bruner, testified that defendant's appraisal of commercial real property takes into account reliable data from the sales assessment ratio study, numerous independent appraisals, and reviews made of local assessor's records, and assessment levels. Industrial property is appraised in much the same manner, with a higher degree of review made of local assessor's actions. All local assessors continually receive the benefits of educational materials and programs to assist them in maintaining accurate appraisals.

*Burlington Northern Railroad Co. v. Bair*, No. 83-100-A, slip op. at 16-18 (SD IA March 14, 1985).

Although it would be highly unlikely that the Department was successful in assessing all other commercial and industrial property at 100% of its true market value, the Court need not and is not making such a finding. The Court of Appeals stated:

\* \* \* the Department of Revenue assessments are entitled to great deference. We hold that the burden is on Burlington Northern, as the party attacking the accuracy of the Department values, to show



by a preponderance of the evidence what the accurate values are.

*Burlington Northern Railroad Co. v. Bair*, 766 F.2d at 1226.

The railroad has not met its burden. The only evidence it offered was not satisfactory to the Court for the reasons given above. The Court concludes on the basis of the evidence presented and by giving deference to the assessments of the Department of Revenue that the assessed values and market values of all other commercial and industrial property are the same.

### CONCLUSION

The Court in this ruling has attempted to set forth principles, specific figures, findings of facts and conclusions of law that will enable the parties, by using their expertise, to arrive at the four factors to be included in the formula set out above. The computation will reveal whether the ratio of the assessed value of the railroad's real property to its true market value is at least 5% greater than that ratio of all other commercial and industrial property in Iowa, as identified herein.

As the Court cannot determine at this time which is the prevailing party, the Court directs the plaintiff to take the responsibility for the preparation of an Order for Judgment in accordance with this Ruling and Order and submit the same to the defendant for comment or approval. Any questions about the Ruling and Order may be submitted to the Court.

IT IS SO ORDERED.

Signed this 16th day of July, 1986.

/s/ W. C. Stuart  
W. C. STUART  
Judge  
Southern District of Iowa

## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA

No. C85-767T

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*

-vs-

DEPARTMENT OF REVENUE OF THE STATE  
OF WASHINGTON, *et al.*,  
*Defendant.*

### ORDER GRANTING PRELIMINARY INJUNCTION

WHEREAS plaintiff Burlington Northern Railroad Company filed an amended complaint for injunctive and declaratory [sic] relief alleging a violation by the defendants of § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L.No. 94-210, 90 Stat. 54 (Feb. 5, 1976), 49 U.S.C. § 11503, resulting from the valuation, assessment and equalization by the defendants for the tax year 1984 of the plaintiff's transportation property within the State of Washington; and

WHEREAS plaintiff filed a motion for a preliminary injunction restraining and enjoining the defendants, and each of them and their agents and those acting in concert or participation with them, from valuing, assessing and equalizing plaintiff's transportation property for the 1984 tax year in violation of § 306 and from collecting or causing to be collected the ad valorem tax payment due on or before October 31, 1985, which collection would also violate § 30; and

WHEREAS a hearing was held on October 4, 17, 18 and 21, 1985, at which time the parties appeared through



counsel and presented testimonial and documentary evidence as well as legal arguments; and

WHEREAS the Court has considered the legal briefs and arguments presented by the parties, the documentary evidence of the parties, and the testimony of Dr. Arthur A. Schoenwald for the plaintiff and Mr. Thomas Eden for the defendant Department of Revenue, and good causing appearing;

NOW, THEREFORE, THIS COURT FINDS:

1. That this Court has jurisdiction under § 306 and in exercising its jurisdiction to determine if discrimination which is prohibited by § 306 exists, this Court can make findings of fact regarding the discriminatory impact upon plaintiff resulting from certain methods of assessment utilized by defendants in calculating the true market and assessed value of plaintiff's transportation value.

2. That plaintiff, for purposes of obtaining a preliminary injunction, must prove, and has proven, reasonable cause to believe that § 306 has been, and is about to be violated by the defendants, and that plaintiff must prove, and has proven, reasonable probability of success in prevailing at a trial on the merits of this matter. In so doing, plaintiff established a reasonable probability of proving at trial:

(a) That the defendants' assessed value of plaintiff's transportation property for 1984, allocated to the State of Washington, is \$316,865,788.00 (plaintiff's exhibit 14);

(b) That the true market value of plaintiff's transportation property for 1984, allocated to the State of Washington, is significantly less than the value computed by defendants. (plaintiff's exhibit 13).

(c) That the defendants, in applying their three indicators to value and their allocation formula, have

knowingly used principles and techniques which cannot properly be applied to railroads and which have been rejected by the courts, which are fundamentally flawed, which result in a value which is substantially higher than true market value, and which systematically discriminate against the plaintiff.

The preceding results from the following acts of defendant:

(1) A determination in the derivation of the cost indicator that no allowance should be made for obsolescence to plaintiff's property rather than an allowance of 36.2% (plaintiff's exhibit no. 2, p. 46).

(2) The use of a limited life sinking fund model which has caused the value of plaintiff's property derived from the income indicator to be fixed at \$3,115,146,000.00 (defendant's exhibit A-1) rather than \$2,286,414,000.00 (plaintiff's exhibit no. 7).

(3) The use of the income and property influence method rather than the direct method which has overstated the value of plaintiff's property derived from the use of the stock and debt indicator by \$1.4 billion (plaintiff's exhibit no. 4).

(4) The use of depreciation accounting rather than retirement-replacement-betterment (RRB) accounting in fixing valuations for plaintiff's property through the income and cost indicators.

(5) The use of the cost indicator, together with the income and stock and debt indicators, rather than the income and stock debt indicators only, in arriving at a final system valuation for transportation property.

(6) The use of an allocation factor of 8.77% which did not include in its computation an alloca-

tion of plaintiff's rolling stock between the State of Washington and other operating locations of such stock, rather than 8.23%, the factor submitted by plaintiff, in apportioning transportation property to the State of Washington for ad valorem property tax purposes.

(d) The use by the State of those improper methods and techniques of appraisal, described in the preceding paragraph, has caused the ratio of the assessed value of plaintiff's transportation property to actual true market value to exceed by at least 5% the ratio of assessed value of all other property in the assessment jurisdiction to the true and fair value of such property.

(e) That the differences between the plaintiff's value and the defendants' value do not result from a difference in professional opinion but result from the fundamental errors contained in the defendants' valuation model.

3. That § 306 discrimination need not be purposeful or intentional by the defendants. *Burlington Northern Railroad Co. v. Bair*, 766 F.2d 1222, 1226 (8th Cir. 1985); *Louisville & Nashville Railroad Co. v. Department of Revenue*, 736 F.2d 1495, 1498 (11th Cir. 1984). However, even if § 306 required the defendants to purposefully and intentionally discriminate against the plaintiff, the plaintiff has, at this stage of the proceedings, established reasonable cause to believe that the §§ 306 discrimination was purposeful and intentional and has established a reasonable probability of success in prevailing at a trial on the merits of this matter.

#### ACCORDINGLY, IT IS HEREBY ORDERED

1. That Defendants, and those acting in concert or participation with them, be and they are hereby enjoined,

pendente lite, from the collection or distribution of ad valorem property taxes payable by the plaintiff to the State of Washington and its taxing districts on or before October 31, 1985; are further enjoined from causing the assessment of interest or penalties by reason of the non-payment of such taxes, until further order of the court.

2. That plaintiff is directed to pay into the registry of the Court, for deposit into an interest-bearing account, on or before October 31, 1985, the amount of those taxes the collection of which is hereby enjoined.

3. That the defendant, Department of Revenue of the State of Washington, shall recalculate its assessment of plaintiff's transportation property to correct that part of its previous assessment found by the Court to be in error. Defendant shall further recalculate the amount of taxes payable in 1985 which are not based on values preliminarily found by the Court to be excessive. Defendant shall immediately serve upon plaintiff a copy of its computations.

4. That the parties may thereafter, by stipulation, apply to the Court for modification of its order to permit distribution from the registry of the Court to defendant, Department of Revenue, that part of the taxes agreed to be proper for distribution pendente lite. In the absence of such stipulation defendant may move for modification of this order and upon answer by plaintiff the matter shall be submitted without further hearing.

5. That in the event plaintiff objects to defendants' calculations of taxes for distribution, plaintiff shall file notice of its objections with the Court. Thereafter defendant may move for modification of this order to permit distribution of the taxes, and upon answer by plaintiff, the motion shall be submitted without further hearing.

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6. Any further proceedings herein, other than those matters abovementioned, shall be stayed pending further Order of this Court.

DATED, at Tacoma, Washington, this 25th day of October 1985.

/s/ Joel E. Tanner  
United States District Judge

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

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Civil No. 85-2102LE

UNION PACIFIC RAILROAD COMPANY, and ITS LESSORS  
OREGON-WASHINGTON RAILROAD AND NAVIGATION COM-  
PANY and OREGON SHORT LINE RAILROAD COMPANY,  
*Plaintiffs,*

v.

DEPARTMENT OF REVENUE OF THE STATE OF OREGON  
and THE STATE OF OREGON,  
*Defendants.*

---

Civil No. 85-2103LE

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*

v.

DEPARTMENT OF REVENUE OF THE STATE OF OREGON  
and THE STATE OF OREGON,  
*Defendants.*

---

[Filed May 6, 1986]

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ORDER

Plaintiffs in this consolidated action, Union Pacific Railroad and Burlington Northern Railroad (the Railroads), brought this action under the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503, claiming that the State of Oregon has violated the Act



because the methods used by the Oregon Department of Revenue to appraise the Railroads' property result in overassessment. Defendants, the Oregon Department of Revenue and the State of Oregon, move to dismiss and to abstain.

### DISCUSSION

*Motion to Dismiss.* Section 11503(b) makes it unlawful for a state to:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

Section 11503(c) gives federal district courts jurisdiction to prevent a violation of subsection (b). Such relief may be granted only:

if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction.

To determine whether relief is appropriate the court must compare two ratios: the ratio of the assessed value of "transportation property" to its true market value, and the ratio of the assessed value of all other commercial and industrial property in the same assessment jurisdiction to its true market value.

Comparing these ratios would seem to require the Court to make findings of fact as to the ratios' four components: the assessed value of the railroad property, the true market value of the railroad property, the assessed value of other commercial and industrial property in the same assessment districts and the true market

value of the commercial and industrial property. The statute provides that, in making such findings, "the burden of proof in determining assessed value and true market value is governed by State law." 49 U.S.C. § 11503(c).

Defendants contend that the court does not have jurisdiction to make an independent determination of the true market value of railroad property. They argue that because the statute contemplates use of a sales assessment ratio study in determining the true market value of commercial and industrial property, but gives no direction as to how the true market value of railroad property is to be determined, by implication, the court may not make that determination. Defendants also argue that legislative history supports their interpretation.

Defendants' interpretation is contradicted by the plain language of the statute. True market value, as used in § 11503, must have a same meaning throughout. If Congress intended true market value to have one meaning with respect to commercial and industrial property and another meaning with respect to railroad property, the statute would have so specified. The starting point in every case involving construction of a statute is the language itself. *Landreth Timber Co. v. Landreth*, 105 S.Ct. 2297, 2301 (1985). The primary rule of statutory construction is to ascertain and give effect to the plain meaning of the language used. *Shields v. U.S.*, 698 F.2d 987, 989 (9th Cir. 1983) *cert. denied*, 104 S.Ct. 73 (1983). 49 U.S.C. § 11503 is clear on its face. In determining whether the statute has been violated, the court has jurisdiction to consider evidence and make factual findings as to the true market value of the Railroads' property.

*Motion to Abstain.* Defendants argue that, even if the court has jurisdiction, the court should abstain from the exercise of such jurisdiction until after the Railroads have exhausted their remedies under state law, or, at

least, until the Ninth Circuit Court of Appeals has ruled on the jurisdiction question.

Section 11503(b)(2) prohibits states from levying or collecting a tax on an assessment prohibited under subsection (b)(1). The national policy against discriminatory taxation of railroads reflected in § 11503 requires federal district courts to hear § 11503 cases brought before them. *Southern Railway Company v. State Board of Equalization*, 715 F.2d 522, 530 (11th Cir. 1983). The motion to abstain is denied.

IT IS ORDERED that defendants' motions to dismiss and abstain are denied.

Dated this 5th day of May, 1986.

/s/ Edward Leavy  
United States District Judge

[SEAL]

THE STATE OF WYOMING

Ed Herschler  
Governor

AD VALOREM TAX DIVISION

THE DEPARTMENT OF REVENUE  
AND TAXATION

Herschler Building 122 West 25th Street  
Cheyenne, Wyoming 82002-0110

Burlington Northern Railroad	Ad Valorem Tax Division
J. H. Kenny—Mgr. Property Taxes	Phone 307/777-7215
2100 First Interstate Center	Warren A. Bower
999 Third Avenue	Director
Seattle, WA. 98104	Robert St. Clair
	Assistant Director

June 13, 1985

RE: Notice of Assessed Valuation for Taxation Purposes  
The State Board of Equalization has, under the provisions of Title 39-2-201, Wyoming Statutes 1977, placed a valuation on your RAILROAD property in Wyoming in the following amount for taxation purposes for the year 1985:

Taxable Assessed Valuation	\$26,975,450
----------------------------	--------------

Title 39-2-201(d) provides that appeals of taxable values set by the State Board of Equalization may be filed in writing within fifteen (15) days following receipt of notice. If the last day for filing the appeal falls on Saturday, Sunday or a holiday, the appeal shall be timely if received by the end of the first succeeding working day. An appeal and all papers in connection therewith shall be considered filed by the Secretary to the Board as of the date of postmark when sent by United States mail.

An appeal shall set forth what is being appealed, shall state, in ordinary and concise language, the facts upon

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which the appeal is based, and shall state the relief desired. The notice of appeal must also contain the petitioner's address.

/s/ Robert R. Forsberg  
ROBERT R. FORSBERG  
Supervisor of State Assessments  
Ad Valorem Tax Division

RRF/lb

83a

[SEAL]

THE STATE OF WYOMING

Ed Herschler  
Governor

AD VALOREM TAX DIVISION

THE DEPARTMENT OF REVENUE  
AND TAXATION

Herschler Building-1W 122 West 25th Street  
Cheyenne, Wyoming 82002-0110

Burlington Northern Railroad  
J.H. Kenny—Regional Director  
Property Tax Div.  
2600 Continental Plaza Bldg.  
777 Main Street  
Fort Worth, TX 76102

Ad Valorem Tax Division  
Phone 307/777-7215  
Warren A. Bower  
Director  
Robert St. Clair  
Assistant Director

July 3, 1986

RE: Notice of Assessed Valuation for Taxation Purposes  
The State Board of Equalization has, under the provisions of Title 39-2-201, Wyoming Statutes 1977, placed a valuation on your RAILROAD property in Wyoming in the following amount for taxation purposes for the year 1986:

Taxable Assessed Valuation                      \$56,197,574

Title 39-2-201(d) provides that appeals of taxable values set by the State Board of Equalization may be filed in writing within fifteen (15) days following receipt of notice. If the last day for filing the appeal falls on Saturday, Sunday or a holiday, the appeal shall be timely if received by the end of the first succeeding working day. An appeal and all papers in connection therewith shall be considered filed by the Secretary to the Board as of the date of postmark when sent by United States mail.

An appeal shall set forth what is being appealed, shall state, in ordinary and concise language, the facts upon



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which the appeal is based, and shall state the relief desired. The notice of appeal must also contain the petitioner's address.

/s/ Robert R. Forsberg  
ROBERT R. FORSBERG  
Supervisor of State Assessments  
Ad Valorem Tax Division

RRF/lb

(4)  
No. 86-337

Supreme Court, U.S.

FILED

OCT 2 1986

JOSEPH F. SPANIOL, JR.  
CLERK

**IN THE**  
**Supreme Court of the United States**  
October Term, 1986

**BURLINGTON NORTHERN RAILROAD COMPANY,**

Petitioner,

V.

**OKLAHOMA TAX COMMISSION, ODIE A. NANCE, Chairman of the Oklahoma Tax Commission; ROBERT T. WADLEY, Vice-Chairman of the Oklahoma Tax Commission; J. L. MERRILL, Secretary-Member of the Oklahoma Tax Commission; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, Chairman of the State Board of Equalization of the State of Oklahoma; SPENCER BERNARD; LEO WINTERS; JAMES CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, Members of the State Board of Equalization of the State of Oklahoma,**

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE TENTH CIRCUIT**

**BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

**J. LAWRENCE BLANKENSHIP  
GENERAL COUNSEL**

**DONNA E. COX  
FIRST ASSISTANT  
GENERAL COUNSEL**

September 25, 1986

**OKLAHOMA TAX  
COMMISSION  
2501 Lincoln Boulevard  
Oklahoma City, OK 73194  
(405) 521-3141**

**ATTORNEYS FOR  
RESPONDENTS**

11817

## QUESTIONS PRESENTED

Whether the federal district courts may require a preliminary showing of purposeful overvaluation with discriminatory intent to establish subject matter jurisdiction conferred in 49 U.S.C. §11503 to prevent discriminatory state taxation in a case alleging only de facto discrimination in the state's valuation of rail transportation property for ad valorem tax purposes?

Whether the federal district courts may decide fundamental subject matter jurisdiction without affording the complaining railroad an evidentiary hearing to make a preliminary showing of purposeful overvaluation with discriminatory intent?



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**IN THE  
Supreme Court of the United States**

October Term, 1986

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**No. 86-337**

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**BURLINGTON NORTHERN RAILROAD COMPANY,**

Petitioner,

V.

**OKLAHOMA TAX COMMISSION, ODIE A. NANCE, Chairman of the Oklahoma Tax Commission; ROBERT T. WADLEY, Vice-Chairman of the Oklahoma Tax Commission; J. L. MERRILL, Secretary-Member of the Oklahoma Tax Commission; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, Chairman of the State Board of Equalization of the State of Oklahoma; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, Members of the State Board of Equalization of the State of Oklahoma,**

Respondents.

---

**BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

---



## STATEMENT OF OPPOSITION TO THE WRIT

Respondents, the Oklahoma Tax Commission, each of its three contemporaneous members, the State Board of Equalization of the State of Oklahoma, and each of its seven contemporaneous members<sup>1</sup>, respectfully oppose the issuance of a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on May 2, 1986. The decision of the Tenth Circuit in this proceeding is not in conflict with any decision of another federal court of appeals on the same matter, nor does it sanction an unacceptable departure by the lower court from the usual course of judicial proceedings.

The decision applied a threshold jurisdictional requirement, a showing of purposeful overvaluation with discriminatory intent, enunciated in **Burlington Northern Railroad Company v. Lennen**, 715 F. 2d 494 (10th Cir. 1983) cert. denied 104 S. Ct. 2690 (1984). The threshold jurisdictional requirement was applied to a peculiar set of facts that is not likely to recur, facts that occurred in an attempt to assure Oklahoma's assessment process complied with §11503. And, rather than create conflict among the circuits, this decision is a complement to the network of heterogeneous factual cases decided by the circuits.

## STATEMENT OF THE CASE

Petitioner sought declaratory and injunctive relief in the United States District Court for the Western District of Oklahoma under 49 U.S.C. §11503, formerly §306 of the Railroad Revitalization and Regulatory Act of 1976, P.L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976), from an alleged de facto overvaluation of its taxable rail transportation

<sup>1</sup>The attorneys for the Oklahoma Tax Commission, at the request of the State Attorney General, entered appearance on behalf of the State Board and the named members in the District Court and represented all Respondents in the Tenth Circuit. The Oklahoma Tax Commission is authorized to represent the interests of the State of Oklahoma in 68 O.S. 1981, §§105 and 232.

property in Oklahoma for the 1982 ad valorem tax assessment. Petitioner, at the time of filing the complaint dismissed in this proceeding and at the present time, had and has an administrative protest challenging the 1982 valuation pending before the State Board of Equalization of the State of Oklahoma pursuant to 68 O.S. 1981, §2466, appealable to the Oklahoma Supreme Court and then to this Court.<sup>2</sup>

In its Complaint, filed March 3, 1983, Petitioner sought relief of its valuation only, without any challenge to the allocation factor, the assessment ratio, or the valuation methodology or the valuation of commercial-industrial property. Respondent, Oklahoma Tax Commission, on March 25, 1983, motioned the District Court to dismiss the Complaint for want of subject matter jurisdiction, under 49 U.S.C. §11503 and 28 U.S.C. §1341, to hear pure valuation controversies arising out of the administration of state or local ad valorem taxes. Response to the Complaint with Appendices was filed on April 21, 1983, providing detailed explanation of the 1982 assessment process and records of the official assessment acts.<sup>3</sup>

After the decision in **Burlington Northern Railroad Company v. Lennen**, 715 F. 2d 494 (10th Cir. 1983) cert. denied 104 S. Ct. 2690 (1984), Petitioner amended its Complaint to include the conclusionary jurisdictional allegation that Respondents "purposely overvalued Burlington Northern's property with discriminatory intent."<sup>4</sup> After lengthy discovery and briefing relating to the issues of subject matter jurisdiction and procedure for pre-trial

<sup>2</sup>Burlington Northern Railroad Company has pending state administrative protests for 1982, 1983, 1984 and 1986. The 1982 and 1983 protests were stayed at the request of Burlington Northern Railroad Company pending the federal court litigation. The 1984 protest has been fully tried although the findings of the administrative law judge have not been issued. See Appendix pages A-24 — A-27.

<sup>3</sup>Appendix pages A-8 — A-22.

<sup>4</sup>Petitioner's Appendix pages 40a — 41a.

jurisdiction consideration, the District Court ordered Petitioner to present its jurisdictional facts tending to show discriminatory overvaluation. Determination of subject matter jurisdiction is fundamentally preliminary to the Court's power to exercise control over the cause. **Leroy v. Great Western United Corporation**, 443 U.S. 173, 1980, 99 S. Ct. 2710, 61 L. Ed. 2d 464, 472 (1979).

In dismissing the Complaint for failure to make a showing of purposeful overvaluation with discriminatory intent, the District court found that Oklahoma's assessment process for 1982 substantially changed from that used in years past, including that used in 1981, and marked a clean break with the past; that the 1982 assessment percentage used to assess all rail transportation property was the average assessment percentage used at the county level to assess commercial and industrial property; that the 1982 valuation methodology or formula used to value rail transportation property was changed to give greater emphasis to capitalized income; that the termination of assessment conferences with the railroad tax managers allowed greater uniformity in the assessment of rail transportation property process; that Petitioner's annual assessments have constantly decreased every year since 1976; that Petitioner's 1981 self-assessment was substantially greater than the challenged 1982 assessment; and, that Petitioner failed to establish a prima facie case of intentional discrimination.<sup>5</sup>

In affirming the District Court dismissal, the Tenth Circuit Court of Appeals noted that Petitioner did not allege "... any procedure that on its face demonstrated valuation discrimination against railroads, ..." or "... facts from which a trier of fact reasonably could infer discriminatory intent, ..." and that the 1982 assessment process broke the earlier pattern with a new system clearly

<sup>5</sup>Petitioner's Appendix pages 7a — 17a.

<sup>6</sup>Petitioner's Appendix pages 3a — 4a.

reflecting an attempt to comply with §11503. And, the Tenth Circuit noted that Petitioner is not prevented from pursuit of its state administrative and court remedies to settle the actual market value challenge.<sup>7</sup>

#### STATUTORY PROVISION INVOLVED

49 U.S.C. §11503 is set forth in the Appendix at A-1.

Petitioner asserts that review in this proceeding is imperative because the Tenth Circuit has thwarted the clear, unequivocal mandate of Congress, implicit in §11503, that the federal courts shall set the standard for valuation of rail transportation property for ad valorem tax purposes and correct the state's valuation, case by case. This assertion is untenable.

Section 11503 is an exercise of the Commerce Clause powers. In subsection (a) of §11503, Congress defined four essential terms: (1) assessment, (2) assessment jurisdiction, (3) rail transportation property and (4) commercial and industrial property. Congress did not define true market value, valuation nor equalization. In subsection (b) of §11503, Congress declared four acts to unreasonably burden and discriminate against interstate commerce: (1) assessment of rail transportation property at a value (assessed value) which has a higher ratio to true market value than the assessed value of other commercial-industrial property in the assessment jurisdiction to true market value; (2) levy or collection of a tax on an assessed value determined in violation of (b)(1); (3) levy of a tax rate on the assessed value of rail transportation property in excess of the tax rate on the assessed value of other commercial-industrial property in the same assessment jurisdiction; or, (4) levy of another tax that discriminates against a rail carrier providing transportation.

Subsection (b) does not limit the state's authority to frame its true market value standards (valuation formula or

<sup>7</sup>Petitioner's Appendix page 5a, footnote 1.



methodology) for valuing rail transportation property. It preserves the state's authority to exercise the essential and fundamental steps in the assessment process limiting that authority only to prevent discriminate favor to other commercial and industrial property. This limitation contemplates that a state may not indiscriminately assess, at the same assessment percentage of true market value, both rail transportation property and other commercial industrial property, as was the case in 1965. This is equalization discrimination which, in 1965, occurred in most states.<sup>8</sup> In the instant case, the state's valuation formulas for rail transportation property and commercial-industrial property were uniformly utilized and a single assessment percentage, 10.86%, was utilized in the assessment process, as preserved to the states by §11503.

In subsection (c) of §11503, Congress vested jurisdiction in the United States District Courts to prevent or enjoin a violation of subsection (b), concurrent with other jurisdiction of the federal and state courts, and limited that jurisdiction to prevent de facto violation only if the ratio of assessed value to true market value of rail transportation property exceeds, by at least five percent, the ratio of assessed value to true market value of other commercial and industrial property.

Petitioner urges the necessity for a broad construction of the declared discriminatory acts prohibited and the judicial remedy created in §11503. The Congressional history of §11503 directs otherwise. The Congressional history, replete with testimony of the railroad representatives who promoted and secured passage of Section 306, now §11503, clearly indicates that the authority of a state to value rail transportation property in accordance with its standards and methods formulated under its laws would not be affected by §306; that §306 would not be triggered until

<sup>8</sup>S. Rep. No. 1483, 90th Cong., 2nd Sess. (1968).

after valuation.<sup>9</sup>

For over a decade the railroads generally through their legal counsel, appeared before succeeding Congresses on precursor bills to §306 and before various standing Committees or Subcommittees and represented that §306 did not empower or require the federal courts to calculate, arbitrate or determine fair market values. Members of Congress were concerned that §306 might impose non-judicial functions upon the federal courts in view of the recent decision in **Moses Lake Homes Inc. v Grant County, Washington**, 365 U.S. 744, 81 S. Ct. 870, 6 L. Ed. 2d 66 (1961). In response to this concern, Professors Paul H. Sanders and Paul J. Hartman, Vanderbilt University, in a legal memorandum to the Committee on Commerce,

<sup>9</sup>S. Rep. No. 1483, 90th Cong., 2nd Sess. (1968), accompanying S. 927, at p. 1 states that the "remedy in the Federal courts for common and contract carriers is against the collection of the excessive portion of any tax based upon such unlawful assessment or rate."

Testimony of Mr. Phillip M. Lanier, Vice-President for Law, Louisville and Nashville Railroad Company, also speaking on behalf of the Association of American Railroads, before the Senate Subcommittee on Surface Transportation of the Committee on Commerce relative to S. 2289, 91st cong., 2d Sess., a successor bill to S. 927, p. 39 is that "The (valuation) formula varies from State to State and we are not dealing with the valuation question. This is not our problem. We speak only of the equalization of the tax rate." Before the same subcommittee hearings, Mr. Broley E. Travis advocated that the federal courts must be involved in valuation, "Well, I believe, it would be my impression, being an engineer, and not an attorney, that the Federal Courts would have to review both the valuation as made by the administrative officers, and the equalization."

The Senate Committee on Commerce rejected Travis' argument; by appendix to the report adopted or readopted the comments on true market value as expressed in regard to S. 927, including a finding that S. 2289 does not require or suggest that states change their assessment standards or practices and thereby plainly stated that S. 2289 is not a standard for determining value.

And, testimony of Mr. Lanier before the House of Representatives, H.R. 1624, 91st Cong., 1st Sess., (1970) at pp. 138-139, states, "On the valuation —this bill would not deal with valuation being standard. The standards and methods of valuation that any State wishes to use would be totally unaffected by this legislation . . . it is only in the area of equalization of the computed value that this legislation speaks. That is where our problem is . . . Because we are speaking in terms of uniformity of the equalization ratio, . . . once the fair market value is determined, . . ."



opined that S. 927 did not impose any invalid or non-judicial function upon the federal courts to perform tax assessment functions; and, that the federal courts can and should construe the legislation to avoid any charge that a non-judicial function must be performed.<sup>10</sup>

In **Moses Lake**, supra, a proceeding ancillary to condemnation, ad valorem tax assessments of Grant County, Washington were challenged under the Wherry Act, National Housing Act, §§801-809, 12 U.S.C. §§1748-1748h-1. Similar to the required comparison of rail transportation property and other commercial-industrial property in §11503, the statute involved in **Moses Lake** authorized taxation of government leaseholds not in excess of the taxation of non-government leaseholds. This Court noted the discriminatory assessment of non-government leaseholds at 50% of fair value and government leaseholds at 100% of fair value. The United States Court of Appeals for the Ninth Circuit ruled that the higher taxes at issue did not invalidate the entire tax; that the taxes should be reduced to comply with the Wherry Act; and, remanded to the district court to make the necessary reductions to the assessments. This Court reversed the Ninth Circuit stating, "Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one." *Id.* 365 U.S. 752. This pronouncement was the authority for Professors Sanders and Hartman's message to Congress that the federal courts must avoid non-judicial functions, i.e., supervising the valuation or appraisal of rail transportation property.

The Congressional history has been reviewed by most of the federal courts for guidelines in interpreting the issue of subject matter jurisdiction in §11503. **Ogilvie v. State Board of Equalization**, 657 F. 2d 204 (8th Cir. 1981); **Trailer Train**

**Company v. State Board of Equalization**, 697 F. 2d 860 (9th Cir. 1981); **Burlington Northern Railroad Co. v. Lennen**, 715 F. 2d 494 (10th Cir. 1983). The federal courts have consistently found that the exception to 28 U.S.C. §1341 in §11503 must be construed in view of its history. **Lennen**, supra, **Atchison Topeka and Santa Fe Railway Company v. State Board of Equalization of the State of California**, 795 F. 2d 1442 (9th Cir. 1986). This history does not support Petitioner's request for urgent broad construction of §11503 by this Court.

#### DECISIONS OF THE OTHER CIRCUITS

Elementary to this Petition is Petitioner's sentiment that it was right in **Lennen**, supra, 715 P. 2d 494 (1983) cert. denied 104 S. Ct. 2690 (1984). The trial court in **Lennen** granted injunctive relief on the equalization claim but refused to grant injunctive relief on the valuation claim. The Tenth Circuit, in **Lennen** found an absence of specific statutory direction and an absence of specific Congressional intent that the federal district courts should be involved in the intricacies of the valuation process. *Id.* p. 497. The Tenth Circuit did not close the federal courts to valuation discrimination. It required a showing of discrimination to establish subject matter jurisdiction. The Tenth Circuit, in **Lennen**, recognized the express exception to 28 U.S.C. §1341 but refused to extend the exception so as to allow the railroads to escape the noninterference mandate of §1341 for any and all ad valorem tax challenges.

In **Lennen**, Burlington Northern had alleged that Kansas increased the 1982 valuations in retaliation for the equalization relief from the 1981 assessments. The trial court found no retaliation. However, the trial court ruled that if the railroad could make a strong showing of deliberate overvaluation in retaliation for past equalization relief, then valuation relief could be granted. Thus, the allegations in **Lennen** required the Tenth Circuit to fashion a jurisdictional rule, in addition to the recognized general

<sup>10</sup>S. Rep. No. 1483, 90th Cong. 2d Sess. (1968) accompanying S. 927, p. 12.

§1341 noninterference rule.

In the instant proceeding, the valuation allegations and evidentiary record were insufficient to bring Petitioner within the prohibitions in §11503. Both the noninterference rule of §1341 and the jurisdictional rule set forth by the trial court in **Lennen** were argued. When this Court denied certiorari in **Lennen**, the complaint herein was amended to include jurisdictional allegations required in **Lennen**, thus the trial court needed not to consider the §1341 argument.<sup>11</sup>

In **Atchison Topeka and Santa Fe Railway Company v. Board of Equalization of the State of California**, 795 F. 2d 1442 (9th Cir. 1986) the trial was separated into three phases. In phase I the court reviewed the state's valuation methodologies for rail transportation property and other commercial industrial property and found no discrimination. The railroads allege errors by California in application of the methodology and use of inflated figures.

The trial court found it had jurisdiction to evaluate methodology and equalize ratios, but it did not have jurisdiction to hear valuation claims, phase II. The Ninth Circuit reversed the ruling on jurisdiction to hear valuation claims, but, under the particular situation of that case, pending state court litigation, the Ninth Circuit ordered abstention. Quoting **Lennen**, the Ninth Circuit recognized that an overly broad construction of §11503 would significantly burden the federal judiciary and that §11503 is an exception to §1341 but not to the general principles of abstention. Holding the railroads to their decision to file suite both in state and federal court on the same issue, the Ninth Circuit deferred to the state courts.

The Ninth Circuit decision is not in conflict with the Tenth Circuit. The two circuits approached the threshold jurisdictional issues as dictated by the facts and circumstances of each case.

<sup>11</sup>Burlington Northern's federal action for valuation relief from the 1983 assessment is pending. Appendix pages A-3 — A-7.

In **Burlington Northern Railroad Company v. Bair**, 766 F. 2d 1222 (8th Cir. 1985) de jure and de facto discrimination were alleged. Injunction issued against the de jure discrimination. De facto discrimination was claimed based upon both valuation and equalization. At p. 1225, the Eighth Circuit stated "Burlington Northern has not appealed the District Court's May, 1984 dismissal of the claim alleging overvaluation. However, the railroad does pursue its claim under section 306 (1)(a) for proper equalization." The Eighth Circuit distinguished its equalization case from the **Lennen** overvaluation case. On remand from the Eighth Circuit, in the equalization-valuation confusion of this case, the Eighth Circuit may be similarly situated as was the Ninth Circuit in **Moses Lake**, supra.<sup>12</sup>

In **Louisville and National Railroad Company v. Department of Revenue, State of Florida**, 736 F. 2d 1495 (11th Cir. 1984) the issue was assessment ratio equalization. The parties stipulated that rail transportation property was assessed at 100% of its value and that other commercial-industrial property is assessed at less than 100%. The issue was what is the level of assessment of commercial-industrial property. This case is not inconsistent with the **Lennen** jurisdictional rule. Citing **Lennen**, the Eleventh Circuit stated, "In evaluating these contentions, we begin by observing that the bar of section 11503 extends to de facto discrimination as well as de jure." p. 1498. In discussing de facto discrimination the Eleventh Circuit said, "Discriminatory intent is not a precondition to recovery once disparate impact is shown." p. 1498.<sup>13</sup> Florida's application of its factors in determining just value (true market value) of commercial-industrial property resulted in substantial undervaluation, thus discriminatory intent was not a precondition to relief.

<sup>12</sup>Petitioner's Appendix, pp. 43a-70a.

<sup>13</sup>At page 15, footnote 17, Petitioner omits "once disparate impact is shown." from its quote of the 11th Circuit.



Undervaluation of locally assessed commercial-industrial property was also the basis of the discrimination claim in **Southern Railway Company v. State Board of Equalization**, 715 F. 2d 522 (11th Cir. 1983). The Georgia Department of Audits sales ratio study showed that local nonrail property was preferentially assessed at far below 40% of fair market value as required by state law. As Florida did in the **Louisville and National Railroad** case, 736 F. 2d 1494 (11th Cir. 1984), Georgia made the railroads jurisdictional showing. Such facts or circumstances are not in the instant case nor the challenged **Lennen** case.

And, the decision of the Fourth Circuit in **Richmond, Fredericksburg and Potomac Railroad Company v. Department of Taxation of Virginia**, 762 F. 2d 375 (4th Cir. 1985), is not inconsistent with **Lennen**. The Fourth Circuit, at page 379, held, "Accordingly, a journey into the jungle of legislative history is unnecessary because we hold that §306 (1)(d), on its face, clearly and unambiguously prohibits all forms of discriminatory taxation of railroads."<sup>14</sup>

The ad valorem tax litigation under §11503, since its effective date in 1979, involves a myriad of factual situations circumstances. These heterogeneous fact situations often were due to the states' attempts to comply with §11503 as well as avoid §11503. The states are working to establish appraisal standards that will be acceptable among them.<sup>15</sup> This case does not threaten the principal purposes of §11503 and it does not present sufficient scope for this Court to provide guidance to all the states and the federal judiciary. The differing factual scenarios prevent direct conflict

<sup>14</sup>§306 (1)(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part." At page 14, Petitioner again omits the Court's language which distinguishes that case from **Lennen**.

<sup>15</sup>International Association of Assessing Officers, "News Bulletin," September, 1985, Vol. 7, No. 9, ISSN 07414609, announced copies available of the Post-Conference Report of the National Conference on Unit Valuation Standards, the conference was attended by 24 states in 1984 and 1985 in Denver, Colo and will be held in Dallas, Texas in Dec. 1986.

among the circuits, thus review by this Court is not warranted.

### REASONS FOR DENYING THE WRIT

The factual determination by the District Court, concurred in by the Tenth Circuit, do not warrant certiorari. **Graves Manufacturing Co. v. Linde Co.**, 336 U.S. 271, 69 S. Ct. 535, 93 L. Ed. 672 (1948); **Appalachian Power Co. v. American Institute of Certified Public Accountants**, 361 U.S. 82, 80 S. Ct. 16 (1961). Review of decisions of administrators, absent proof that a discriminatory purpose has been a motivating factor, does not warrant certiorari. **Village of Arlington Heights v. Metropolitan Housing Development Corporation**, 429 U.S. 252, 97 S. Ct. 555, 563, 50 L. Ed. 2d 450 (1977). Review of evidence and specific facts before the District Court does not warrant certiorari. **United States v. Johnson**, 268 U.S. 220, 45 S. Ct. 496, 69 L. Ed. 925 (1924). The scope of the legal issue in this proceeding is episodic and limited by the factual determinations and does not warrant certiorari. **Rice v. Sioux City Cemetery**, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1954). The legal issue in this proceeding is not an important question touching the accommodation of state and federal interests and does not warrant certiorari. **Kosydar v. National Cash Register Co.**, 417 U.S. 62, 94 S. Ct. 2108, 40 L. Ed. 2d 660 (1954). The questions presented do not bring this proceeding within Rule 17 and do not warrant certiorari.

### CONCLUSION

The Tenth Circuit's decision does not directly undermine Congress' considered resolution of a serious national problem. The decision does not decide a substantial legal issue of general importance to the judicial administration of §11503. The decision is not sharply out of line with the decisions of other Courts of Appeals.

The challenge presented to the District Court in this



proceeding was not within the enumerated acts of discriminatory taxation declared by Congress in §11503. The challenge is a pure valuation claim. The Courts below relegated Petitioner to its state court remedies.

The opinions below serve judicial economy and preserve both the federal and state interests in the administration of ad valorem taxation of rail transportation property. The narrow issue in this proceeding does not warrant issuance of a writ of certiorari.

For these reasons, Respondents respectfully oppose issuance of a writ of certiorari to review the order and judgment of the United State Court of Appeals of the Tenth Circuit in this proceeding.

Respectfully submitted,

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ATTORNEYS FOR  
RESPONDENTS

## **CERTIFICATE OF SERVICE**

I hereby certify that three copies of Respondents' Brief in Opposition to Petition for Writ of Certiorari were deposited in the United States post office in Oklahoma City, Oklahoma on the 30th day of September, 1986, with first-class postage prepaid, addressed to counsel of record for the Petitioner.

DONNA E. COX

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## A-1 APPENDIX

### §11503. Tax discrimination against rail transportation property

(a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA  
BURLINGTON NORTHERN  
RAILROAD COMPANY,

Plaintiff,

vs.

NO. CIV-83-419R

OKLAHOMA TAX COMMISSION;  
ODIE A. NANCE, CHAIRMAN OF  
THE OKLAHOMA TAX  
COMMISSION; ROBERT T.  
WADLEY, VICE-CHAIRMAN OF  
THE OKLAHOMA TAX  
COMMISSION; J. L. MERRILL,  
SECRETARY-MEMBER OF THE  
OKLAHOMA TAX COMMISSION;  
STATE BOARD OF  
EQUALIZATION OF THE STATE  
OF OKLAHOMA; GEORGE NIGH,  
CHAIRMAN OF THE STATE  
BOARD OF EQUALIZATION OF  
THE STATE OF OKLAHOMA;  
SPENCER BERNARD; LEO  
WINTERS; JACK CRAIG;  
CLIFTON SCOTT; DR. LESLIE  
FISHER; and MIKE TURPEN,  
MEMBERS OF THE STATE  
BOARD OF EQUALIZATION OF  
THE STATE OF OKLAHOMA,



## Defendants.

BURLINGTON NORTHERN  
RAILROAD COMPANY;  
MISSOURI-KANSAS-TEXAS  
RAILROAD COMPANY;  
MISSOURI PACIFIC RAILROAD  
COMPANY; ST. LOUIS  
SOUTHWESTERN RAILWAY  
COMPANY,

## Plaintiffs,

vs. NO. CIV-83-2165-R

OKLAHOMA TAX COMMISSION;  
ODIE A. NANCE, CHAIRMAN OF  
THE OKLAHOMA TAX  
COMMISSION; ROBERT T.  
WADLEY, VICE-CHAIRMAN OF  
THE OKLAHOMA TAX  
COMMISSION; J. L. MERRILL,  
SECRETARY-MEMBER OF THE  
OKLAHOMA TAX COMMISSION;  
STATE BOARD OF  
EQUALIZATION OF THE STATE  
OF OKLAHOMA; GEORGE NIGH,  
CHAIRMAN OF THE STATE  
BOARD OF EQUALIZATION OF  
THE STATE OF OKLAHOMA;  
SPENCER BERNARD; LEO  
WINTERS; JACK CRAIG;  
CLIFTON SCOTT; DR. LESLIE  
FISHER; and MIKE TURPEN,  
MEMBERS OF THE STATE  
BOARD OF EQUALIZATION OF  
THE STATE OF OKLAHOMA,

Defendants.

(Filed April 29, 1985)

**ORDER**

On January 8, 1985 the Court granted the Defendants' Motions to dismiss for lack of subject matter jurisdiction in the above styled cases. The Plaintiff timely filed a Motion For New Trial, Or In the Alternative, For Vacation, Amendment, Or Alteration of Judgment pursuant to Fed. R. Civ. P. 59, to which the Defendants responded in opposition. The motion has been fully briefed, and the Court is now prepared to dispose of it, and an unrelated Motion for Consolidation, in this Order.

It must first be noted that the Plaintiff's motion is cognizable only as a Motion to Alter or Amend Judgment under Fed. R. Civ. P. 59 (e). See **Cook v. Atlantic Richfield Co.**, No. CIV-83-1717-R (W.D. Okla. March 20, 1985). A Motion for New Trial pursuant to Fed. R. Civ. P. 59 (a) is appropriate only where trial on the merits has been conducted, see **Jones v. Nelson**, 484 F. 2d 1165, 1167 (10th Cir. 1973), and no such trial has been conducted in either of these cases. However, it is clear that the Plaintiff's Fed. R. Civ. P. 59 (e) motion properly challenges the Court's January 8 order of dismissal. **Cook**, slip op. at 1. See also **St. Paul Fire & Marine Insurance Co. v. Continental Casualty Co.**, 684 F. 2d 691, 693 (10th Cir. 1982).

The Plaintiff first argues that the order of dismissal should be vacated in the 1982 tax case, No. CIV-83-419-R, for two reasons: (1) The Court erred in determining the jurisdictional issue without hearing live testimony; and, (2) the Plaintiff has discovered new evidence of discriminatory intent regarding the 1982 tax year. The second proposition is now moot, as the Court has refused to allow discovery from the witnesses that the Plaintiff sought to depose for its newly discovered evidence. **Burlington Northern Railroad Co. v. Oklahoma Tax Commission**, No. CIV-83-419-R, slip op. at 2-3 (W.D. Okla. Jan. 23, 1985). And the first proposition is without merit. The Court considered the

facts bearing upon jurisdiction in the light most favorable to the Plaintiff, and live testimony would have lent nothing to the Plaintiff's abortive attempt to establish a **prima facie** case of intentional discrimination. The Plaintiff again seeks to have the Court hear the merits of the action before deciding the jurisdictional question, a procedure rejected as violative of the restrictive jurisdictional rule announced in **Burlington Northern Railroad Co. v. Lennen**, 715 F. 2d 494 (10th Cir. 1983), **cert. denied** 104 S. Ct. 2690 (1984). See **Burlington Northern V. Oklahoma Tax Commission**, No. CIV-83-419-R, **slip op.** at 7-9 (W.D. Okla. Jan. 8, 1985). The Court therefore concludes that the Plaintiff's motion is denied insofar as it seeks a vacation of the order of dismissal in the 1982 tax case.

However, the Court is persuaded that the motion must be granted insofar as it challenges dismissal in the 1983 tax case, No. CIV-83-2165-R. The Court, noting that the Plaintiff had failed to supplement the record in connection with its opposition to dismissal in the 1983 case, concluded that the Plaintiff intended to support its jurisdictional allegations in both cases with the same evidence. See **Burlington Northern Railroad Co. v. Oklahoma Tax Commission**, No. CIV-83-2165-R, **slip op.** at 15 (W.D. Okla. Jan. 8, 1985). However, the Plaintiff now contends, and the Defendants do not seriously dispute, that the parties had agreed to litigate the jurisdictional question in the 1983 tax case only after the Court had ruled on the similar question in the 1982 tax case. The record reflects at least a tacit agreement between the parties, and the Court concludes that the lack of an evidentiary record in No. CIV-83-2165-R results from this agreement. The order of dismissal in the 1983 tax case was therefore premature, and the Court accordingly grants the Plaintiff's motion to the extent that the order of dismissal in No. CIV-83-2165-R is vacated.

There can be little doubt that the Plaintiff intends to appeal the Court's dismissal of the 1982 tax case upon receipt of this Order. Indeed, the Court prefers that its decision be examined on appeal before further proceedings are had in the 1983 tax case. Accordingly, the Plaintiff's Motion for Consolidation of the two cases is denied, and No. CIV-83-2165-R is stayed pending appeal of No. CIV-83-419-R. For the duration of the stay No. CIV-83-2165-R shall be administratively closed, to be reopened upon final disposition of No. CIV-83-419-R.

In summary, the Court reaches the following conclusions:

1. The Plaintiff's Motion For New Trial, Or In the Alternative, For Vacation, Amendment, Or Alteration of Judgment is denied to the extent that it challenges dismissal of No. CIV-83-419-R.
2. The Plaintiff's Motion For New Trial, Or In the Alternative, For Vacation, Amendment, Or Alteration, of Judgment is granted to the extent that it challenges dismissal in No. CIV-83-2165-R.
3. The order of dismissal in No. CIV-83-2165-R is vacated.
4. The Plaintiff's Motion for Consolidation is denied.
5. Case No. CIV-83-2165-R is stayed and administratively closed pending appeal of the Court's decision in Case No. CIV-83-419-R.

The parties are directed to keep the Court apprised of the appellate proceedings in No. CIV-83-419-R.

IT IS SO ORDERED this 29th day of April, 1985.

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DAVID L. RUSSELL  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

BURLINGTON NORTHERN  
RAILROAD COMPANY,

Plaintiff,

vs.

NO. CIV-83-419R

OKLAHOMA TAX COMMISSION,  
ODIE A. NANCE, CHAIRMAN OF  
THE OKLAHOMA TAX  
COMMISSION; ROBERT T.  
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THE STATE OF OKLAHOMA;  
SPENCER BERNARD; LEO  
WINTERS; JACK CRAIG;  
CLIFTON SCOTT; DR. LESLIE  
FISHER; and MIKE TURPEN,  
MEMBERS OF THE STATE  
BOARD OF EQUALIZATION OF  
THE STATE OF OKLAHOMA,

Defendants.

(Filed April 21, 1983)

**RESPONSE OF DEFENDENT  
OKLAHOMA TAX COMMISSION  
TO COMPLAINT FOR INJUNCTIVE  
AND DECLARATORY RELIEF**

Defendant Oklahoma Tax Commission, Odie A. Nance, Chairman of the Oklahoma Tax Commission, Robert L. Wadley, Vice-Chairman of the Oklahoma Tax Commission, and J. L. Merrill, Secretary-Member of the Oklahoma Tax Commission, for answer and defense to the allegations set forth in the Complaint For Injunctive and Declaratory Relief denies each and every such allegation except as hereinafter expressly admitted. The following numbered paragraphs of this Response correspond to the numbered paragraphs of the Complaint.

1. Defendant admits 49 U.S.C. §11503 grants this Honorable Court jurisdiction, concurrent with state courts of Oklahoma, to prevent ad valorem tax discrimination against rail transportation property where and only if:

- (a) the **assessment ratio** of assessed value to true market value of such rail transportation property is greater than or exceeds by at least five percent (5%) the assessment ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction; or,
- (b) the **tax millage rate** (levy) of any local taxing jurisdiction applied to the assessed valuation of rail transportation property is greater than or exceeds the tax millage rate of same local taxing jurisdiction applied to commercial and industrial property in the same assessment jurisdiction.

Defendant specifically denies that it is a proper party to this purported action as Defendant neither assesses, levies or collects ad valorem tax. Defendant is the fact gathering



arm of the State Board of Equalization. Defendant's duty is to receive annual ad valorem tax reports from the various railroad and public service corporations that operate within the State of Oklahoma and thereupon to make findings of valuation and recommendations of assessment purposes. 68 O.S. 1981, §2454. Further, as assistance to the State Board, Defendant has a duty to make investigations and inspections when necessary to assure that no such property escapes taxation. 68 O.S. 1981, §§2454 and 2455. Defendant has no statutory duties or powers to assess, levy or collect ad valorem taxes in the State of Oklahoma. The Oklahoma Constitution, Article X, §21 mandates the State Board of Equalization assess property of railroads; and, Article X, §9 prohibits the state from levying any ad valorem tax.

Defendant specifically denies that any of its acts are subject to the prohibition in 49 U.S.C. §11503.

Active concert and active participation under Rule 65(d) of the Federal Rules of Civil Procedure is a question of fact for the Court, and Defendant requests Plaintiff be required to make a strict showing thereof. Defendant denies that any person not named as a Defendant herein has or is acting in active concert or active participation regarding any of the allegations set out in the Complaint herein. 61 A.L.R. Fed. 402.

On April 25, 1982, the Oklahoma Tax Commission laid its recommendations for 1982 ad valorem tax assessments of railroad and public service corporation property before the State Board of Equalization. (Defendant's Appendices: A.)

On May 19, 1982, the State Board of Equalization assessed the property of railroad and public services corporations for ad valorem tax purposes. (Defendant's Appendices: B.)

The 1982 ad valorem tax assessment recommended by

the Oklahoma Tax Commission on April 25, 1982 and assessed by the State Board of Equalization on May 19, 1982 is not excessive nor unlawful under 49 U.S.C. §11503 as:

- (a) The average statewide assessment ratio applied to true market value (use value) of commercial and industrial property as determined from the 1981 ratio study of the levels of local assessments of commercial and industrial property is 10.87%. (Defendant's Appendices: C)
- (b) That assessment percentage, 10.87%, was applied to the true market value (use value) of the railroad property of Plaintiff for calculation of 1982 assessed valuation.

### JURISDICTION

2. Defendant specifically denies that this Court has subject matter jurisdiction over the purported Complaint filed herein. (Defendant's Motion to Dismiss and Brief in Support filed herein.)

- (a) 49 U.S.C. §11503 does not confer subject matter jurisdiction upon the federal courts except to prevent the four specified acts declared therein to unreasonably burden and discriminate against interstate commerce, to-wit:

- "(1) excessive assessment percentage or ratio;
- (2) levy upon an assessed value calculated with an excessive assessment percentage;
- (3) excessive millage levy; or
- (4) imposition of another discriminatory tax.

As set out in paragraph numbered 1., Plaintiff's rail transportation property, for 1982 as valorem tax purposes in Oklahoma, was assessed at 10.87 assessment ratio which is the same, exact statewide average assessment ratio applied to local assessed commercial and industrial

property as determined from the most current completed study of levels of assessment by county assessors within Oklahoma as of April 25, 1982.

(b) 28 U.S.C. §1341 bars subject matter jurisdiction granted under 28 U.S.C. §1337.

(c) 28 U.S.C. §1341 bars subject matter jurisdiction granted under 28 U.S.C. §1331.

### **PARTIES**

3.-10. Defendant admits Plaintiff's allegations in paragraphs numbered 3. - 10.

### **AD VALOREM TAXATION IN OKLAHOMA**

11. Defendant admits that 64 O.S. 981, §2404 specifies property subject to ad valorem taxation in Oklahoma. The Oklahoma Constitution, Art. X, Section 6 specifies property exempt from ad valorem taxation and Art. V, Section 50 prohibits the Legislature from enacting any law exempting property from taxation except as provided in the Constitution.

12. Defendant admits that 68 O.S. 1981, §2427 mandates the county assessor shall assess all property subject to local assessment. Defendant specifically denies that §2427 is pertinent or applicable herein.

13. Defendant admits that 68 O.S. 1981, §2444 is the legislative mandate, required by Oklahoma Constitution Art. V, §59, that the local millage (tax levies) be uniform upon all taxable property within the taxing jurisdiction. Defendant specifically responds that it is this uniformity that precludes subject matter jurisdiction herein under 49 U.S.C. §11503, (b)(3).

Defendant specifically denies that every railroad, including Plaintiff, does make its return on or before March 15 of each year. Defendant specifically responds that under

68 O.S. 1981, §2453, the Oklahoma Tax Commission may extend the time for 15 days. Plaintiffs filed its verified return form on March 31, 1982, returning no value for track and right of way; and later other information was filed. (Defendant's Appendices: D.)

14. Defendant specifically admits that under 68 O.S. 1981, §2454 the Oklahoma Tax Commission is enjoined with mandatory, discretionary duties to assist the State Board of Equalization in the assessment of real and personal rail transportation property of Plaintiff. Defendant specifically responds that the Oklahoma assessment procedure requires three steps: (1) full valuation X (2) assessment percentage = (3) assessed valuation. (*Cantrell v. Sanders*, 610 P. 2d 227 (Okla: 1980).

Defendant specifically responds that the procedures for recommendations of assessment of rail transportation property, the Oklahoma Tax Commission determines full system unit value allocated to Oklahoma and applies the assessment percentage thereto to calculate recommended assessed value:

- (1) original cost of assets X 40%
- (2) capitalized net operating income X 60%
- (3) = system value X allocation factor X assessment percentage = assessed value.

(Capitalized net operating income is calculated by weighting the last three years income the most recent year 3, next most recent year 2 and last most recent year 1, capitalized at 14% for 1982 calculation.)

(Original cost is based upon cost paid during early statehood for a great portion of Plaintiff's rail transportation property.)

(Allocation is based upon seven factors **as reported** by the Plaintiff.) (Defendant's Appendices: D and E.)

Further Defendant specifically responds that the Okla



homa Tax Commission has a clear, specific statutory duty to make its recommendation to the State Board of Equalization as to assessment of railroad property of Plaintiff, on or before April 25 of each year. (68 O.S. 1981, §2454); that the 10.87 assessment percentage or ratio was recommended to the State Board of Equalization for the specific, stated purpose of compliance with the 4-R Act, 49 U.S.C. §10101, et seq. (Defendant's Appendices: A); that during 1981, in its equalization of the local assessments, the State Board of Equalization rejected the findings and recommendations of the Oklahoma Tax Commission for equalization; that the validity of the 1981 Ratio Study of the levels of local assessment was attacked and presented to the Oklahoma Supreme Court in **Poulos v. State Board of Equalization, et al.**, 646 P. 2d 1269 (Okla: 1982) (Poulos III) decided May 25, 1982, six days after the May 19, 1982 assessment involved herein; that at the statutorily required time for making recommendations, (April 25, 1982) the Oklahoma Tax Commission did not have resolution as to the validity of its 1981 Study and that the 1982 Study was incomplete as same is not required or even possible to complete until the third Monday in June of each year, (68 O.S. 1981, §2473) the mandated time for filing of abstracts of assessments by the county assessors with the Oklahoma Tax Commission; and that, in order to, in good faith, comply with 49 U.S.C. §11503, recommendation was made for assessment of all rail transportation property of any railroad operating within Oklahoma at the same percentage of Oklahoma full value (use value/true market value) as the statewide average local assessment percentage for commercial and industrial property.

15. Defendant specifically admits Plaintiff's paragraph number 15.

16. Defendant specifically admits that 68 O.S. 1981,

§2456 requires the State Board of Equalization to certify the assessed values of property of railroads and public service corporations to the various county assessors on or before the **third Monday** in June of each year; that the assessment of such property is complete when the State Board of Equalization is mandated to meet on the **fourth Monday** in June to equalize local assessments, 68 O.S. 1981, §2463.

17. Defendant specifically admits that 68 O.S. 1981, §2462 enjoins certain powers and duties upon the Oklahoma Tax Commission regarding equalization of local assessments. Defendant specifically denies that §2462 is pertinent or applicable herein, except that it is the statutory duty which causes the annual studies of levels of local assessments to be completed by the Oklahoma Tax Commission.

18. Defendant specifically denies that 68 O.S. 1981, §2463 is pertinent or applicable herein; and, Defendant advises that in Poulos III the highest court of this state had before it issues and allegations based upon no evidence as to levels of local assessments **except** the 1981 Study of the Oklahoma Tax Commission; at page 1273, the Court decreed:

"There being no valid reason shown for not adopting the 12% ratio as recommended by the Commission, we hereby determine by judicial decree that all property within the State of Oklahoma subject to ad valorem taxes shall be assessed at 12% of its taxable value with permissible inter-county deviations of not more than 3% above or below the mean, and that said percentage shall apply to the 1982 tax year and thereafter until such time as the same shall be changed by the recommendation of the Commission and the determination by the Board based upon good and sufficient valid, legal grounds as



provided in 68 O.S. 1971, §2463.”; further Defendant advises that in 1982, Plaintiffs protested, under 68 O.S. 1981, §2466, valuation of its Oklahoma rail transportation property; that administrative hearing was not had prior to filing the Complaint herein; that the 1982 administrative protests of public service corporations were resolved in **McLoud Telephone Company v. State Board of Equalization, et al.**, decided December 16, 1982; that in **McLoud**, the 26% assessment percentage applied to Oklahoma full value of taxable property of the public service corporations, other than railroads, to calculate assessed value was upheld; and, that the Court held that assessments by the State Board of Equalization were unaffected by the cases involving uniformity or equalization of local assessments. (**Poulos v. State Board of Equalization**, 552 P. 2d 1134 (Okla: 1975); **Poulos v. State Board of Equalization**, 552 P. 2d 1138 (Okla: 1976); **Cantrell v. Sanders**, 610 P. 2d 227 (Okla: 1980) and **Poulos III**.)

19. Defendant specifically admits that 68 O.S. 1981, §24303 authorizes ad valorem taxes do not become delinquent if one-half paid on or before January 1 and one-half paid on or before March 31 of each year.

#### SECTION 306

20. Defendant specifically responds that Section 306 quoted by Plaintiff was amended in 1978 prior to the effective date of the Section and that 49 U.S.C. §11503 is clear, unambiguous and speaks for itself. (Defendant's Appendices: F.)

21. Defendant specifically admits the definition of assessment as set forth in §11503, supra, but denies that assessment is defined to mean any valuation other than the assessed valuation upon which the tax millage is applied as used in §11503 (b)(2).

22. Defendant specifically denies the definition of “transportation property” as alleged; §11053 (a)(3) defines “rail transportation property.” Defendant specifically denies that all operating property of the Burlington Northern that is subject to ad valorem taxation by the State of Oklahoma is “transportation property” within the meaning of §11503; Burlington Northern Company report for 1980 indicates the diversified business interests to have property subject to ad valorem taxation in Oklahoma that is not “rail transportation property.” (Defendant's Appendices: G.)

23. Defendant specifically admits the definition of “commercial and industrial property” as set out in §11503. Defendant responds that in 1981, the assessment percentages applied to the use valuation (true market value) of locally assessed commercial and industrial property by the 77 county assessors had a statewide average of 10.87%; that in 1981 the assessment percentages applied to the Oklahoma full value (true market value) of railroad and public service corporation property ranged from 8.25% to 35%, the Constitutional maximum, constituting a range of deviation of 26.75% (Defendant's Appendices: H); that for 1982 ad valorem tax assessment purposes, the Oklahoma Tax Commission treated property of railroads and public service corporations as separate and distinct classes of property because such classifications are specifically referred to in the Constitution and Statutes of this state and decisions of the Oklahoma Supreme Court; that the 1982 recommendations of the Oklahoma Tax Commission and the 1982 assessments of the State Board of Equalization removed any discriminatory effect created by a range of assessment percentages within each of the two classes by assessing the property of any corporation within each class at a single, uniform assessment percentage (i.e., railroads at

10.87% and public service corporations at 26%). (Defendant's Appendices: H and J.)

24. Defendant specifically denies Plaintiff's paragraph numbered 24. Defendant specifically responds that the congressional studies (Plaintiff's Appendix) showed rail property in Oklahoma was assessed at 60% of full value in 1985, while other property was assessed at 20%; that the congressional reports (Plaintiff's Appendix) showed rail property in Oklahoma was assessed at 35% in 1968 while other property was assessed at 18%; that upon enactment of the "4-R Act in 1976, State of Oklahoma began a program to eliminate any discriminatory tax burden on rail transportation property due to ad valorem tax assessments; that the current valuation formula to determine system unit value allocated to Oklahoma was initiated as well as reduction in the assessment percentage (Defendant's Appendices: I); and, that in 1981, the mean assessment percentage applied to rail transportation property was 10.29%; Burlington Northern was assessed at 10.99%. (Defendant's Appendices: J.)

#### **ASSESSMENT OF BURLINGTON NORTHERN'S PROPERTY FOR THE 1982 TAX YEAR**

Defendant specifically denies Plaintiff's paragraph numbered 25. Defendant specifically responds that for the 1981 assessment, based on information from the ICC R-1 report as of December 31, 1980, the Oklahoma Tax Commission made findings that the Oklahoma allocated value of the system unit value of Burlington Northern's rail transportation property was \$136,563,361.00; this finding was based upon system unit value of \$3,641,689,619.00 allocated to Oklahoma at 3.75%; that the Oklahoma Tax Commission recommended and the State Board of Equalization assessed the Burlington Northern at 10.99% of its Oklahoma value or \$15,014,650.00 assessed value

(Defendant's Appendices: J and K); and, that the Burlington Northern had returned its self-assessed value of Oklahoma taxable property at \$14,335,355.00 (Defendant's Appendices: L.) (Prior to the 1959 Amendment to the Oklahoma Constitution limiting assessment to 35%, the "returned value" was ideally "100% value." With the 35% limit, "returned value" became the recommended "assessed value" by the taxpayer or the self-assessment. (Exhibit A to Affidavit of Hal L. Hefner filed April 11, 1983.) Plaintiff's admitted an assessed value in 1981 of \$14,335,355.00 which is greater than the 1982 assessed value of \$13,717,367.00

26. Defendant specifically denies Plaintiff's paragraph numbered 26.

27. Defendant specifically responds that the ratio study set out hereinbefore was conducted by the Oklahoma Tax Commission and that the statewide average assessment percentage applied to commercial and industrial property by the various county assessors was 10.87% in 1981.

28. Defendant specifically denies Plaintiff's paragraph numbered 28. Defendant specifically responds that for the 1982 assessment, based on information from the ICC R-1 report as of December 31, 1981, the Oklahoma Tax Commission made findings that the Oklahoma allocated value of the system unit value of Burlington Northern's rail transportation property was \$126,194,731.00; this finding was based upon system unit value of \$3,574,921,544.00 allocated to Oklahoma at 3.53%; that the Oklahoma Tax Commission recommended and the State Board of Equalization assessed the Burlington Northern at 10.87% of its Oklahoma value or \$13,717,367.00 assessed value. (Defendant's Appendices: B and M.)

29. Defendant specifically denies Plaintiff's paragraph numbered 29, except, Defendant specifically admits the assessment by the State Board of Equalization on May 19,



1982. (Defendant's Appendices: B.)

30. Defendant specifically admits Plaintiff's paragraph numbered 30.

31. Defendant specifically admits that the Plaintiff protested the May 19th assessment and specifically deny all other allegations contained in Plaintiff's paragraph numbered 31.

32. Defendant specifically responds that Defendant has no exact knowledge of Plaintiff's paragraph numbered 32.

33. Defendant specifically denies Plaintiff's paragraph numbered 33.

#### **BURLINGTON NORTHERN'S SECTION 306 §11503) CLAIM**

34-43. Defendant specifically denies each and every allegation set forth in Plaintiff's paragraph numbered 34 through 43. Defendant specifically responds that Plaintiff's paragraphs numbered 34 through 43 present a pure valuation (appraisal) controversy, unaccompanied by any discrimination; that the State of Oklahoma has lowered year after year the assessed values of railroad property in compliance and specifically has **continually** lowered the tax burden of Burlington and its predecessor, the St. Louis and San Francisco Railroad Company; that the decrease in tax burden of this Plaintiff has been **very** substantial; that Congress determined that there existed instances of excessive assessments and, hence, tax discrimination in 1965 and for the reason 1965, as a benchmark for the expression of certain values, which are, of course, not constant due to the effects of inflation on "Dollar" figures, is used to demonstrate the serious reduction in tax burden that Plaintiff has enjoyed due to the 4-R Act; that, a real Dollar comparison shows to what very significant degree Oklahoma has lowered Burlington's "assessment"; that,

where an assessment decreases, assuming tax rates are unchanged, then taxes paid will accordingly be decreased; that since Burlington has made no averment of tax rate discrimination, it must be assumed that the purported "discrimination" arises solely from the assessment figure itself; that a historical analysis shows that even discounting inflation, Burlington's system values have inexorably been lowered over a thirty-three (33) year period (see Exhibit "A" to Affidavit of Hal L. Hefner); that when these figures are adjusted for inflation based upon the rate of inflation, as calculated by the Implicit Price Deflator for Railway Equipment, United States Department of Labor, then the amounts are compared on a constant Dollar basis, and the extreme reductions Oklahoma has made in Plaintiff's assessment amounts are readily apparent; (Affidavit of Gene Tyner, Sr.); that, for example, in 1965 Dollars, the assessment of Frisco was \$29,680,459.00. In 1981, Burlington's assessment was \$15,014,650.00 (\$4,438,866.17; 1981 Dollars equivalent value in 1965 based upon Implicit Price Deflator Indices); that in 1982, the disputed year, Burlington's assessment was \$13,717,367.00 (\$3,703,689.00; 1982 Dollars equivalent value in 1965); that these figures show that the 1965 assessment of \$29,680,459.00 has been reduced in the subsequent seventeen years to a figure (expressed in comparable values) of \$3,703,689.00; that this is a **decrease** of approximately 799.93% in Burlington's assessment amount from the benchmark year, 1965, wherein Congress found tax discrimination; that the 1981 assessment figure of \$15,014,650.00 expressed in 1982 Dollars is: \$16,410,562.50; that the 1982 disputed assessment (also in 1982 Dollars), therefore, expresses a **reduction** of approximately 16% in assessment amount over the prior tax year (Exhibit "F" to Tyner Affidavit); that when actual assessment amounts (affidavit of Hal Hefner) are com



pared, there has been a constant reduction up to and **including** the tax year (1982) in question; that when comparisons are calculated discounting the effects of inflation (affidavit of Gene Tyner, Sr.) then these constant reductions expressed in the same value, are even more significant; that **never** in modern history has either the Oklahoma Tax Commission (through its recommendation) or the Oklahoma State Board of Equalization (through its assessment) raised or inflated Burlington's Oklahoma system assessment amount from that of the previous year; that the decline of Burlington's assessment has been continuous and significant; that when rates of reduction from the 1965 assessment (Tyner Affidavit, Exhibit "F") are compared to rates of reduction of the railroad's rendered value (Tyner Affidavit, Exhibit "E"), Oklahoma's rate of decrease is greater up to 1982. However, in 1982, the State Board's assessment drops another 2.25% to 12.50% of what it assessed in 1965. Nevertheless, Burlington proposes its value to drop to 10.71% of what it rendered in 1965 or, stated differently, to approximately one-third that which it rendered the prior year (29.25% to 10.71%).

44. WHEREFORE, Defendant prays that this Court deny and refuse to grant any relief to Plaintiffs and dismiss Defendant with cost.

#### OKLAHOMA TAX COMMISSION

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J. LAWRENCE BLANKENSHIP  
General Counsel

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DONNA E. COX  
Attorney

2501 Lincoln Boulevard  
Oklahoma City, OK 73194-0011  
(405) 521-3141

#### CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing "Response of Defendant Oklahoma Tax Commission to Complaint for Injunctive and Declaratory Relief" was mailed, postage prepaid, to:

James W. McBride and  
Gregory G. Fletcher  
Suite 1101  
1700 K Street, N.W.  
Washington, D.C. 20006

Michael Minnis  
Suite 1310  
First Oklahoma Tower  
210 West Park Avenue  
Oklahoma City, Oklahoma 73102

James B. Franks  
Assistant Attorney General  
Room 112  
State Capitol Building  
Oklahoma City, Oklahoma 73105

Dated this 21st day of April, 1983.

---

Donna E. Cox

A-24

May 27, 1982

Mr. Tom Daxon  
State Auditor and Inspector and  
Secretary, State Board of Equalization  
111 State Capitol Building  
Oklahoma City, Oklahoma 73105

Re: Assessment of Oklahoma Property of  
Burlington Northern Railroad Company

Dear Mr. Daxon:

On behalf of Burlington Northern Railroad Company, which this firm represents in the State of Oklahoma, a complaint is hereby lodged pursuant to 68 O.S. 1971 §2466 in protest of the assessed valuation of the above-referenced property. The basis of the protest of this assessed valuation of \$13,717,367 for 1982, as set forth in your letter to Mr. T. C. Wehner, Springfield, Missouri, dated May 21, 1982, is that it is not properly computed, grossly excessive, void and legally insufficient.

A hearing before the State Board of Equalization is hereby requested including a request for adequate notification of the date of said hearing, so that this company may present evidence, including expert testimony regarding the correct basis for valuation.

Very truly yours,

Ben Franklin, of  
FRANKLIN, HARMON & SATTERFIELD, INC.

BF:en  
cc: Mr. T. C. Wehner  
Mr. Steve Wood

-24-

A-25

July 22, 1983

Mr. Clifton Scott  
State Auditor and Inspector and  
Secretary, State Board of Equalization  
111 State Capitol Building  
Oklahoma City, Oklahoma 73105

**HAND DELIVERED**

Re: 1983 Assessment of the Oklahoma Property of  
Burlington Northern Railroad Company

Dear Mr. Scott:

This is in response to your letter of July 15, 1983 setting the assessed value of the Burlington Northern Railroad Company at \$13,034,512 for 1983. Such assessed value is based upon a 1983 Oklahoma fair cash value of \$119,912,716. Pursuant to 68 O.S. 1981 Section 2466, Burlington Northern hereby protests such assessment as being based upon a value far in excess of true market value of Burlington Northern's property in Oklahoma.

Specifically, Burlington Northern claims that the value is excessive because, in calculating the cost factor, the Tax Commission has failed to take into account the substantial obsolescence present in property of Burlington Northern. Additionally, in arriving at system value, the Tax Commission has given far too much weight to the cost approach and far too little weight to the income approach. As a result of such errors, the 1983 assessment of Burlington Northern is grossly excessive, void and illegal.

Very truly yours,  
PIERSON, BALL & DOWD

MM/jl

Michael Minnis

-25-

June 20, 1984

Mr. Clifton H. Scott  
 State Auditor and Inspector and Secretary  
 State Board of Equalization  
 111 State Capitol Building  
 Oklahoma City, Oklahoma 73105

Re: 1984 Assessment of the Oklahoma Property of  
 Burlington Northern Railroad Company

Dear Mr. Scott:

This is in response to your letter of June 14, 1984, advising Burlington Northern Railroad Company ("Burlington Northern") that the State Board of Equalization ("State Board") has fixed the fair cash value of Burlington Northern's property in the State of Oklahoma as of January 1, 1984, at \$114,724,690.00. Pursuant to Okla. Stat. Ann., tit. 68, §2466, Burlington Northern hereby protests this determination of fair cash value on the ground that it far exceeds the true market value of Burlington Northern's property in Oklahoma.

The fair cash value proposed by the State Board is excessive because, in calculating the cost factor, the Oklahoma Tax Commission and the State Board failed to take into account substantial obsolescence present in the property of Burlington Northern. Additionally, in arriving at a system value, the Oklahoma Tax Commission and the State Board gave far too much weight to the cost approach, and far too little weight to the income approach. As a result of such errors, the proposed 1984 fair cash value, which will form the basis of Burlington Northern's 1984 assessment, is grossly excessive and illegal.

Burlington Northern contends that the full system value of its property as of January 1, 1984, does not exceed 2.3 billion dollars. This full system value, allocated to the State of Oklahoma at 3.271% and reduced by \$919,711.00 to account for the value of non-operating property, produces an Oklahoma fair cash value of \$74,313,289.00. The dollar amount of the fair cash value under protest is, therefore, \$40,411,401.00 (\$114,724,690.00 minus \$74,313,289); the amount of the proposed fair cash value which is not under protest is \$74,313,289.00.

Your letter of June 14, 1984, unlike previous letters from the State Auditor advising Burlington Northern of its fair cash value (See e.g., letters from the State Auditor to Burlington Northern dated July 15, 1983, and May 21, 1982) does not specify either an assessment ratio nor an assessed valuation for Burlington Northern for 1984. Burlington Northern reserves the right, therefore, to object to, or to protest, whatever assessment ratio and/or assessed valuation may be ultimately proposed or adopted by the State Board for Burlington Northern for the 1984 assessment year.

Very truly yours,

Gregory G. Fletcher  
 Counsel for Burlington  
 Northern Railroad Company

GGF:rb

cc: Mr. James W. McBride  
 Mr. Jeffrey D. Lerner  
 Mr. David Harris  
 Mr. T. C. Wehner



3  
No. 86-337

Supreme Court, U.S.

FILED

SEP 20 1986

EDWARD SPANIOLO, JR.  
CLERK

**In the Supreme Court of the United States**

**OCTOBER TERM, 1986**

**BURLINGTON NORTHERN RAILROAD COMPANY, PETITIONER**

**v.**

**OKLAHOMA TAX COMMISSION, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
IN SUPPORT OF PETITIONER**

**CHARLES FRIED**

*Solicitor General*

**RICHARD K. WILLARD**

*Assistant Attorney General*

**ALBERT G. LAUBER, JR.**

*Deputy Solicitor General*

**RICHARD G. TARANTO**

*Assistant to the Solicitor General*

**ANTHONY J. STEINMEYER**

**BARBARA C. BIDDLE**

**JEFFREY CLAIR**

*Attorneys*

*Department of Justice*

*Washington, D.C. 20530*

*(202) 633-2217*

1872

### **QUESTION PRESENTED**

Whether, in a case alleging that a state has overvalued railroad property for ad valorem property tax purposes, the prohibition against discriminatory state taxation of railroads in Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. 11503, is limited to purposeful overvaluation with discriminatory intent.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1986

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No. 86-337

BURLINGTON NORTHERN RAILROAD COMPANY, PETITIONER

v.

OKLAHOMA TAX COMMISSION, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
IN SUPPORT OF PETITIONER**

---

**INTEREST OF THE UNITED STATES**

This case concerns the scope of federal court jurisdiction to restrain discriminatory state taxation of railroads under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 54 (codified at 49 U.S.C. 11503). The 4R Act, developed over the course of 15 years of congressional investigation and study, is an integral part of a national transportation policy intended to protect interstate rail commerce from the burdens of discriminatory state taxation. The United States has a strong interest in preserving the federal courts' power to enforce these statutory protections. This Court on a previous occasion has invited the United States to express its views on the question presented. See U.S. Amicus Br., *Burlington N. R.R. v. Lennen*, No. 83-802, cert. denied, 467 U.S. 1230 (1984) (U.S. *Lennen* Br.).

## STATEMENT

1. Section 306 of the 4R Act prohibits, and vests federal district courts with jurisdiction to enjoin, state tax practices that discriminate against railroads. Congress enacted the law, after 15 years of study, in response to its findings that the nation's railroads were in poor economic condition and that their revitalization required elimination of the long-standing burden placed on them by widespread discriminatory state taxation of railroad property. Congress expressly found that such taxation "constitute[s] an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce" (§ 306(1), 90 Stat. 54). This statutory prohibition against discriminatory taxation is an integral part of Congress's comprehensive attempt to revitalize the railroad industry. See U.S. *Lennen Br.* at 1-3.

Section 306 broadly prohibits a state from imposing any tax "which results in discriminatory treatment of a common carrier by railroad" (§ 306(1)(d), 90 Stat. 54).<sup>1</sup> With respect to tax rates, the statute forbids a state to impose a tax rate on railroad property higher than the rate imposed on other commercial and industrial property (§ 306(1)(c), 90 Stat. 54). With respect to tax assessments (and taxes levied or collected based on assessments), the statute declares a state's assessment practices unlawfully discriminatory unless there is a rough equality between (a) the ratio of assessed value to "true market value" for rail-

<sup>1</sup> When recodified in 1978, this statutory language was altered slightly to prohibit any tax "that discriminates against a rail carrier providing transportation subject to the jurisdiction of the [Interstate Commerce] Commission." Pub. L. No. 95-473, 92 Stat. 1446 (codified at 49 U.S.C. 11503(b)(4)). This change was made solely "for clarity." See 49 U.S.C. 11503 (Historical and Revision Notes). All of the 4R Act provisions discussed in this brief are now codified at 49 U.S.C. 11503, and there is no significant difference between the original and recodified versions.

road property and (b) the ratio of assessed value to "true market value" for all other commercial and industrial property (§ 306(1)(a) and (b), 90 Stat. 54). Unlawful discrimination occurs if the first ratio exceeds the second by at least 5% (§ 306(2)(c), 90 Stat. 54).

The statute provides that "the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law" (§ 306(2)(d), 90 Stat. 55). A railroad is permitted to use a statistical sampling technique to establish the ratio of assessed value to true market value for all other (*viz.*, non-railroad) commercial and industrial property (§ 306(2)(e), 90 Stat. 55). If that ratio cannot be satisfactorily established by such a random-sampling method, the court is required to base its computation on "all other property in the assessment jurisdiction," not just on the commercial and industrial property (*ibid.*). If state tax practices are found to discriminate against railroads, a federal district court is empowered under Section 306(2) to enjoin the violation, notwithstanding the Tax Injunction Act, 28 U.S.C. 1341.

As the courts of appeals have unanimously concluded, Section 306 is violated not only by *de jure* discrimination but also by *de facto* discrimination. See *Atchison, T. & S.F. Ry. v. Board of Equalization*, 795 F.2d 1442 (9th Cir. 1986); *Richmond, F. & P. R.R. v. Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985); *Louisville & N. R.R. v. Department of Revenue*, 736 F.2d 1495, 1498 (11th Cir. 1984); *Burlington N. R.R. v. Lennen*, 715 F.2d 494, 497 (10th Cir. 1983), cert. denied, 467 U.S. 1230 (1984); *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir.), cert. denied, 454 U.S. 1086 (1981). *De jure* discrimination occurs when a state applies a different tax rate or a different assessment percentage (typically a proportion of market value) to railroad property than to other

commercial and industrial property. De facto discrimination occurs when the rates of tax and assessment are nominally the same but the results obtained in the taxing and assessment process are different. Such de facto discrimination can occur in two ways: a state may underestimate the true market value of non-railroad property, while correctly estimating the true market value of railroad property; or the state may overestimate the true market value of railroad property, while correctly estimating the true market value of non-railroad property. A railroad's claim of the first type of de facto discrimination (undervaluation of non-railroad property) has been termed by the courts a claim for "equalization" relief. A railroad's claim of the second type of de facto discrimination (overvaluation of railroad property) has been termed a claim for "valuation" relief. See, e.g., Pet. App. 2a; *Burlington N. R.R. v. Lennen*, 715 F.2d at 496, 497.

2. This case presents a claim for "valuation" relief. Petitioner, a rail carrier, brought this action in the United States District Court for the Western District of Oklahoma to enjoin the Oklahoma Tax Commission from collecting ad valorem property taxes alleged to be excessive and discriminatory under Section 306. Petitioner asserted that Oklahoma tax authorities had so drastically overestimated the market value of its property that the ratio of assessed value to true market value for its property was far in excess of the ratio for non-railroad property (Pet. App. 31a-32a).

The district court, though acknowledging that "the [respondents] themselves admit the existence of a legitimate valuation dispute between the parties," concluded that it lacked jurisdiction to entertain petitioner's claim of discriminatory overvaluation (Pet. App. 16a). In so ruling, the district court relied on the Tenth Circuit's

earlier decision in *Burlington N. R.R. v. Lennen*, 715 F.2d at 497-498. In *Lennen*, the Tenth Circuit held that Section 306 was not "intended to provide relief from every form of de facto discrimination" and that only "equalization, not valuation, relief was intended to be made available to the railroads" (*ibid.*). The court noted the specification in Section 306(2)(e) of statistical random sampling as a permissible method for determining the "true market value" of non-railroad property, whereas the statute "contains no discussion of a proper method for valuing rail property"; the court inferred from this silence a legislative intent that the courts should refrain from taking jurisdiction of overvaluation claims (715 F.2d at 497). The Tenth Circuit in *Lennen* also reasoned that, if Section 306 were construed to permit railroads to bring federal court challenges to the states' computation of railroad property's market value, that construction "would impose significant burdens on district courts and would substantially thwart the tax collection process of states and their subdivisions" (715 F.2d at 498). The *Lennen* court accordingly held that Section 306 does not afford relief from discriminatory overvaluation of railroad property unless the complaining railroad "can make a strong showing of a purposeful overvaluation \* \* \* with discriminatory intent" (*ibid.*).

Turning to the facts of the instant case, the district court held that it was "without jurisdiction to entertain [petitioner's] *de facto* discrimination claims of overvaluation" (Pet. App. 16a). The court stated that the jurisdictional issue had to be "resolved prior to trial" (*id.* at 12a) and that petitioner's pre-trial filings therefore had to "make the requisite 'strong prima facie case of \* \* \* intentional discrimination'" (*ibid.* (quoting *Lennen*, 715 F.2d at 498)). The court concluded that petitioner had not made the necessary showing of discriminatory intent (Pet. App. 14a-16a) and accordingly "dismissed for lack of subject matter jurisdiction" (*id.* at 16a-17a).



On appeal, petitioner first sought *en banc* review of the district court decision, arguing that the Tenth Circuit should overrule *Lennen*. The United States filed a brief amicus curiae in support of that request. We noted that the Eighth Circuit's decision in *Burlington N. R.R. v. Bair*, 766 F.2d 1222 (1985), conflicted with the ruling in *Lennen* and that the issue was of considerable importance to national transportation policy.

The Tenth Circuit rejected petitioner's request for *en banc* review and thereby declined to reconsider *Lennen* (Pet. App. 19a). A panel of the Tenth Circuit subsequently heard petitioner's appeal and affirmed the district court's conclusion that *Lennen* compelled dismissal of the instant suit for lack of subject matter jurisdiction. The panel first reaffirmed the soundness of *Lennen*, reiterating the concern expressed in the earlier case that federal courts should not be asked to "sit as state tax assessment boards for railroad property" (Pet. App. 2a-3a (quoting *Lennen*, 715 F.2d at 498)). The court then agreed with the district court that petitioner had "failed to establish a strong initial showing of [a] prima facie case of intentional discrimination" (Pet. App. 3a). The court reasoned that petitioner had failed to allege that Oklahoma revenue officials had made "remarks regarding an intent to discriminate in valuation" (*ibid.*), had failed to allege any valuation procedure that was discriminatory "on its face" (*id.* at 3a-4a), and had failed to allege "facts from which a trier of fact reasonably could infer discriminatory intent, such as assessments based on flat rates that take no account of an item's value, assessments that ignore changed business conditions, or unexplained radical changes in the methods for calculating value" (*id.* at 4a).

#### REASONS FOR GRANTING THE PETITION

As in *Lennen*, petitioner challenges the Tenth Circuit's requirement that a railroad show purposeful overvaluation with discriminatory intent when alleging a violation

of Section 306 based on overvaluation of railroad property. We argued in our amicus brief in *Lennen* that the Tenth Circuit's construction of the statute is erroneous. See U.S. *Lennen* Br. at 9-15. We nevertheless recommended against certiorari in that case, chiefly because the issue was then one of first impression in the courts of appeals. *Id.* at 16-17.<sup>2</sup> There is now a conflict in the circuits on the question, and we continue to believe that the Tenth Circuit's requirement of discriminatory intent is inconsistent with the language and purposes of the 4R Act. We therefore urge the Court to grant certiorari in this case.<sup>3</sup>

1. The decision below directly conflicts with the Ninth Circuit's recent decision in *Atchison, T. & S.F. Ry. v. Board of Equalization*, 795 F.2d 1442 (1986) (*Santa Fe*). That case, like the instant case, involved a claim for "valuation" relief (795 F.2d at 1445). The Ninth Circuit expressly "decline[d] to adopt the Tenth Circuit's threshold requirement" that a railroad make out "a strong showing of a purposeful overvaluation \* \* \* with discriminatory intent" in order to qualify for relief (*id.* at 1446

<sup>2</sup> In recommending against certiorari in *Lennen*, we also noted that the district court there had found as a fact that no overvaluation of railroad property had been demonstrated, and we suggested that "this alternative ruling provided a sufficient and independent basis for denying a preliminary injunction" (U.S. *Lennen* Br. at 17). In the present case, of course, there is no such finding that could serve as an alternative ground for the decisions below, since petitioner's overvaluation claim was dismissed prior to any adjudication of whether overvaluation existed.

<sup>3</sup> The second question presented by the petition (Pet. i) concerns petitioner's challenge to the district court's dismissal of the overvaluation claim without an evidentiary hearing. Although this question would not independently warrant the Court's review, we think that it would be appropriate to grant the petition in full, so that the Court will retain the opportunity to determine, in the event that it sustains the discriminatory intent requirement, which allegations will suffice to make an evidentiary hearing necessary.

(quoting *Lennen*, 715 F.2d at 498)). Rather, the Ninth Circuit held, without qualification, that federal courts have jurisdiction over "claims of specific instances of overvaluation in state tax assessment of the true market value of rail transportation property" (*ibid.*). The court reasoned (*ibid.*) that

Congress enacted the statute to end what it perceived to be the pervasive and longstanding practice of discriminatory taxation of railroads. Given the important remedial objective of the legislation, it is implausible to assert that the Act was not intended to provide relief from every form of de facto discrimination. Such a holding would frustrate the purposes of the statute and lead to irrational consequences.

Accordingly, the Ninth Circuit held that the district court had erred in dismissing a railroad's overvaluation claim for a lack of jurisdiction under Section 306. 795 F.2d at 1443, 1448.<sup>4</sup>

<sup>4</sup> The Ninth Circuit in *Santa Fe* went on to hold that, although a claim of discriminatory overvaluation of railroad property states a claim for relief under Section 306, the district court should abstain from exercising its jurisdiction over the claim pending completion of related state proceedings previously filed by the railroads, proceedings that might result in the railroads' being "collaterally estopped from asserting the valuation issue" subsequently in federal court (795 F.2d at 1447). Judge Norris dissented on this point (*id.* at 1449-1450). The Ninth Circuit's abstention holding appears to conflict with *Southern Ry. v. State Bd. of Equalization*, 715 F.2d 522, 529 (1983), cert. denied, 465 U.S. 1100 (1984), where the Eleventh Circuit held that Congress, in enacting Section 306, "meant to guarantee a federal forum for railroad suits, and only an exemption from abstention in all its forms would accomplish this purpose." The railroads have petitioned for a panel rehearing on the abstention issue, contending principally that the panel misconstrued the facts regarding the various pending state-court actions. We understand that the Ninth Circuit has directed the defendants to file a response to the rehearing petition by

The decision below also conflicts either directly or in fundamental principle with the Eighth Circuit's decision in *Burlington N. R.R. v. Bair*, 766 F.2d 1222 (1985). The Eighth Circuit there held that "there is no intent element in section 306" and hence that a railroad "need only prove the accurate values, not purposeful undervaluation or overvaluation" (*id.* at 1226). The court stressed that Section 306 requires the district court to make independent findings of fact on the "true market value" of both railroad and non-railroad property (*ibid.*). Otherwise, the court reasoned, "states would be free to discriminate against railroads by assessing a value far in excess of the true market value, while assessing all other property at true market value, and then asserting \* \* \* that assessed value is equal to true value. Regardless of whether it occurs purposefully or by honest error, section 306(1)(a) forbids this type of discrimination" (*id.* at 1225-1226).

The Tenth Circuit below attempted to distinguish *Bair* as involving a claim for "equalization" rather than "valuation" relief, *i.e.*, a claim founded on discriminatory undervaluation of non-railroad property rather than discriminatory overvaluation of railroad property such as is at issue here (Pet. App. 3a). By its own terms, however, the reasoning of *Bair* is fully applicable to claims for "valuation" as well as "equalization" relief. The Eighth Circuit held that under Section 306 a federal court must make findings of fact as to the "true market value" of railroad property and may not defer to a state-law presumption that "assessed values equal true market values" (766 F.2d at 1226). The Eighth Circuit further held that a railroad plaintiff need not show that a state's overvaluation of railroad property is purposeful or inten-

October 3, 1986. As we explain below (pages 12-13, *infra*), we do not believe that the pendency of this panel rehearing petition in *Santa Fe* should cause the Court to deny certiorari here.



tional in order to make out a violation (*ibid.*). Moreover, the *Bair* opinion expressly recognized that, if a railroad were required to prove purposeful overvaluation, "section 306 would be a mere shadow of the relief from discriminatory taxation which Congress intended," since states would then have relative freedom to discriminate against railroads simply by overvaluing railroad property instead of undervaluing other property (*id.* at 1225-1226). The Eighth Circuit's construction of Section 306 is thus inconsistent with the Tenth Circuit's decisions in *Lennen* and in this case.

2. As we explained more fully in our brief in *Lennen*, the Tenth Circuit's requirement of intentional discrimination in overvaluation cases finds no support in the language or legislative history of Section 306. See U.S. *Lennen* Br. at 9-14. The statute clearly focuses on the *results* of state tax assessments, not on state officials' intent in making them. As the original statutory language makes plain, Section 306 prohibits "any \* \* \* tax which results in discriminatory *treatment* of a common carrier by railroad" (§ 306(1)(d), 90 Stat. 54 (emphasis added); see note 1, *supra*). The statutory prohibition on discrimination is defined solely in terms of a simple arithmetic ratio of assessed value to true market value, a definition that makes irrelevant any reference to discriminatory intent (§ 306(1)(a) and (2)(c), 90 Stat. 54). Indeed, the terms "purposeful overvaluation" and "discriminatory intent" can be found nowhere in the language or legislative history of Section 306, but are a gloss on the statute that the Tenth Circuit made up out of whole cloth.

The Tenth Circuit's intent requirement in practical effect would require a federal court to treat a state's determination of the true market value of railroad property as conclusive. Yet the plain language, the legislative history, and the purposes of Section 306 all indicate that the federal courts must inquire into the "true market value" of

railroad property when a railroad makes a valuation claim—when a railroad alleges, in other words, that the assessed-value/market-value ratio for its property exceeds the ratio for other commercial and industrial property. Indeed, there is no dispute that "equalization" claims are cognizable under Section 306 regardless of proof of intentional discrimination. But a state can achieve precisely the same discriminatory result by overvaluing railroad property as by undervaluing non-railroad property. The Tenth Circuit's rule thus allows a form of discriminatory taxation that Section 306 was designed to forbid. The ruling below seriously undermines the broad congressional purpose to outlaw all forms of discriminatory taxation and thereby help restore the nation's railroads to economic vitality. See U.S. *Lennen* Br. at 9-13.

As we noted in our *Lennen* brief, we share the Tenth Circuit's "concern that the federal courts not be converted, by virtue of Section 306, into review boards for determining the correctness of the states' annual assessments of railroad property values." U.S. *Lennen* Br. at 13-14.<sup>5</sup> This concern, however, does not justify judicial rewriting of the statute to require proof of discriminatory intent. Such a requirement would greatly complicate litigation and would have the ironic effect of demanding intrusive judicial probing of state decisionmaking. Congress itself carefully crafted a balance between federal and state interests, making available a federal forum for relief from discrimination against a railroad *qua* railroad, yet adopting other provisions designed to minimize interference with state taxing

<sup>5</sup> It is that concern which appears to underlie, not only the Tenth Circuit's holdings, but also the Ninth Circuit's recently imposed requirement that district courts abstain from deciding "valuation" claims pending the completion of state-court proceedings. *Santa Fe*, 795 F.2d at 1446-1449; see note 4, *supra*.



authority.<sup>6</sup> See, e.g., *Richmond, F. & P. R.R. v. Department of Taxation*, 762 F.2d at 380. The court of appeals had no license, by adopting an "intentional discrimination" requirement unsupported by the statute's language, to alter the balance that Congress quite deliberately struck.

In our view, Section 306 prohibits any overvaluation of railroad property that results "from an assessment rule or methodology that—either on its face or as applied—systematically determines excessive values for railroad property. On the other hand, if a railroad, like any other state taxpayer, asserts only that the state made an error in reaching an excessively high value for its property, no relief for that overvaluation claim would be available under Section 306." U.S. *Lennen Br.* at 14-15. This construction of the statute empowers the district courts to remedy discriminatory taxation founded on systematic overvaluation without subjecting each and every assessment of railroad property to federal court review. Unlike the Tenth Circuit's construction, this reading of Section 306 is faithful to the statutory language and fully protects against the kinds of discrimination that Congress sought to eliminate.

3. Because the ruling of the court of appeals in this case squarely conflicts with the Ninth Circuit's decision in *Atchison, T. & S.F. Ry. v. Board of Equalization*, *supra*, and because the Tenth Circuit's erroneous decision significantly impairs national transportation policy, we urge the Court to grant certiorari in the instant case. We note that there is currently pending before the Ninth

<sup>6</sup> For example, Congress provided that the burden of proof under Section 306(2)(d) must follow state law, so that a railroad will generally have the burden of proof. Congress also provided "a 5-percent tolerance factor" to limit federal intrusions (S. Rep. 91-630, 91st Cong., 1st Sess. 14-15 (1969)) and postponed the effective date of Section 306 for three years to allow states to take necessary corrective measures. See U.S. *Lennen Br.* at 15-16 n. 8.

Circuit a petition for panel rehearing in *Santa Fe*. See note 4, *supra*. That petition for rehearing is not addressed to the panel's holding that the federal courts have jurisdiction to hear a railroad's Section 306 overvaluation claim without any requirement of discriminatory intent, but only to the panel's further holding that a district court should abstain from hearing an overvaluation claim until the completion of related state-court proceedings, which might then have some preclusive effect on issues in the federal overvaluation proceeding.

We do not believe that the pendency of the petition for panel rehearing in *Santa Fe* should cause the Court to decline to grant certiorari here. Because that rehearing petition does not address the "discriminatory intent" question, the present conflict in the circuits will continue to exist regardless of how the petition for rehearing in *Santa Fe* is disposed of. We believe the Ninth Circuit's holding on abstention to be incorrect, and that holding in some circumstances could have much the same practical effect on railroads as the Tenth Circuit's erroneous ruling as to jurisdiction here. If the Ninth Circuit's abstention ruling survives the pending rehearing petition, and if a petition for certiorari challenging that ruling is ultimately filed in *Santa Fe*, the abstention question may well merit this Court's review, either in tandem with or subsequent to the Court's consideration of the instant case.

**CONCLUSION**

The petition for a writ of certiorari should be granted. Alternatively, the Court may wish to defer consideration of the petition until the Ninth Circuit rules on the petition for rehearing now pending in *Santa Fe*.

Respectfully submitted.

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SEPTEMBER 1986

**MOTION FILED**  
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No. 86-337

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

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BURLINGTON NORTHERN RAILROAD COMPANY,  
*Petitioner,*

v.

OKLAHOMA TAX COMMISSION, *et al.,*  
*Respondents.*

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On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

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**MOTION FOR LEAVE TO FILE A BRIEF  
AMICUS CURIAE AND BRIEF AMICUS CURIAE  
OF THE ASSOCIATION OF AMERICAN RAILROADS  
IN SUPPORT OF THE PETITION**

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October 2, 1986



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

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No. 86-337

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BURLINGTON NORTHERN RAILROAD COMPANY,  
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OKLAHOMA TAX COMMISSION, *et al.*,  
*Respondents.*

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On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

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**MOTION OF THE ASSOCIATION OF AMERICAN  
RAILROADS FOR LEAVE TO FILE A BRIEF  
*AMICUS CURIAE***

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The Association of American Railroads ("AAR") respectfully moves this Court for leave to file the attached Brief *Amicus Curiae*.<sup>1</sup> The AAR has limited such re-

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<sup>1</sup> Petitioner has consented to the filing of the brief. The letter signifying this consent has been filed with the Clerk. Respondents have withheld consent. The brief is timely filed under the Rules of the Supreme Court which require filing within the time allowed for the filing of the brief in opposition (Rule 36.1), which is 30 days after receipt of the petition by Respondent (Rule 22.1). Pursuant to information provided by Respondents, Respondents received the petition on September 2, 1986.

quests to instances where issues of overriding concern to the railroad industry are involved and such requests have generally been granted.<sup>2</sup> The Court has generally permitted the participation of industry associations in cases such as this, which involve issues of special concern to the industry as a whole.<sup>3</sup>

The AAR is the trade association for the nation's railroads. Its members employ approximately ninety-four percent of the workers, operate approximately ninety-two percent of the trackage, and account for approximately ninety-seven percent of the freight revenues of all railroads in the United States. The AAR represents its members before courts, agencies and the U.S. Congress when matters of common concern are at issue.

The decision of the Court of Appeals in this case will have a serious and adverse effect on the railroad industry as a whole. In its ruling, the Court of Appeals, relying upon a prior panel decision which the court declined to disturb pursuant to a motion for *en banc* consideration, affirmed a District Court dismissal of a tax discrimination suit brought by the Burlington Northern Railroad Company ("BN") against State of Oklahoma tax authorities under the provisions of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), codified at 49 U.S.C. § 11503 (1982). Pursuant to the jurisdictional test fashioned by the Court of Appeals in its prior decision and applied in the instant case, tax discrimination suits under Section 306 based on claims

<sup>2</sup> See *Burlington Northern, Inc. v. Anderson*, No. 85-1544 (filed May 16, 1986); *Burlington Northern Inc. v. Herold*, No. 85-186 (filed August 30, 1985); *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 450 U.S. 336 (1982); *Kassel v. Consolidated Freightways Corp.*, 449 U.S. 897 (1980).

<sup>3</sup> See, e.g., *Western Airlines v. California*, 53 U.S.L.W. 3484 (U.S. Jan. 7, 1985) (Motion of Air Transport Association of America for leave to file brief *amicus curiae* granted); *Peick v. Pension Benefit Guaranty Corp.*, 465 U.S. 1098 (1984) (American Trucking Association).

of discriminatory overvaluation of railroad property by state tax authorities, as set forth by BN in its District Court complaint, may not be brought unless, at the pretrial stage, a petitioner makes "a strong showing of a purposeful overvaluation . . . with discriminatory intent (App. 2a)." Because BN purportedly did not make a sufficiently strong pretrial showing of intentional discrimination in this case, the Court of Appeals found the District Court dismissal of BN's tax discrimination suit proper.

Should the decision of the Court of Appeals not be overruled by this Court, and the requirement that a rail carrier demonstrate "purposeful overvaluation with discriminatory intent" continue to apply in the Tenth Circuit as a jurisdictional bar to relief for discriminatory overvaluation claims under 49 U.S.C. § 11503, a serious and wholly unwarranted impediment to a grant of relief under that remedial federal legislation would be allowed to remain in place. Not only would this result directly and adversely affect the numerous AAR member railroads operating in the Tenth Circuit with regard to discriminatory overvaluation claims,<sup>4</sup> it would also adversely affect AAR member railroads operating in other jurisdictions by increasing the cost of interstate transportation by connecting rail carriers and correspondingly decreasing the ability of such connecting carriers to compete effectively with other modes in the provision of interstate transportation services. Imposition of discriminatory state taxes, by decreasing the revenues available to member carriers

<sup>4</sup> At least eight Class I railroads are engaged in interstate operations within the territory embraced by the Tenth Circuit. In addition to petitioner BN, the Atchison, Topeka & Santa Fe Railroad Company, the Chicago and North Western Transportation Company, the Denver & Rio Grande Western Railroad Company, the Kansas City Southern Railway Company, the Missouri-Kansas-Texas Railroad Company, the Southern Pacific Transportation Company, and the Union Pacific Railroad Company operate in the Tenth Circuit.

for the maintenance, rehabilitation and expansion of interstate transportation facilities, also directly and adversely affects the ability of such carriers to provide adequate transportation service to the public.

The AAR, on behalf of its member roads, has participated extensively in the legislative process resulting in the enactment of Section 306 of the 4-R Act and has also participated as an *amicus curiae* in several court cases pertaining to the proper construction of Section 306. Based upon the inclusive scope of its industry membership and its familiarity with the relevant issues in the instant case, the AAR is particularly well-suited to present to the Court for its consideration the impact of the case below on the railroad industry and the reasons why the railroad industry strongly supports the petition for certiorari.

Respectfully submitted,

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October 2, 1986

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On Petition for a Writ of Certiorari to the United States  
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BRIEF OF THE ASSOCIATION OF AMERICAN  
RAILROADS *AMICUS CURIAE* IN SUPPORT  
OF THE PETITION

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INTEREST OF THE *AMICUS CURIAE*

As the trade association for the nation's railroads, the Association of American Railroads ("AAR")<sup>1</sup> has a vital

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<sup>1</sup> The AAR is a voluntary, unincorporated, nonprofit association of railroads operating in the United States, Canada and Mexico. Its member railroads employ approximately ninety-four percent of the workers, operate approximately ninety-two percent of the trackage, and account for approximately ninety-seven percent of the freight revenues of all railroads in the United States. The Association represents its member railroads before courts, the U.S. Congress, government agencies and administrative tribunals when matters of common concern are at issue.

interest in the interpretation and application of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, codified at 49 U.S.C. § 11503 ("Section 306").<sup>2</sup> Section 306 was enacted by Congress to prohibit and provide a federal remedy against discriminatory state taxes levied upon railroads, which widespread and long-standing practice Congress found to seriously weaken the nation's railroads and to "constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce." Section 306(1). The AAR, on behalf of the railroad industry, participated in the legislative process that culminated in the passage of Section 306 and has an important and ongoing stake in ensuring that the reforms enacted by Congress in that remedial legislation are not lost to the industry or attenuated through improper judicial construction of Section 306's provisions.

The construction of Section 306 set forth in the Court of Appeals' decision has operated in the instant case, and will continue to operate within the Tenth Circuit unless overturned by this Court, as a serious impediment to the effectiveness and uniformity of the federal remedy against discriminatory state taxation provided by Congress in Section 306. In the instant case, the Burlington Northern Railroad Company ("BN") filed a complaint against Oklahoma state tax authorities pursuant to the provisions of Section 306 claiming that its property had

<sup>2</sup> There are some differences in language between Section 306 as originally enacted [§ 306 of Pub. L. No. 94-210, 90 Stat. 31, 54 (1976)] and as subsequently recodified at 49 U.S.C. § 11503. However, the recodification was not intended to effect any substantive change, and the original language is authoritative. *Richmond, Fredericksburg v. Department of Taxation*, 762 F.2d 375, 377 (4th Cir. 1985); *Olgivie v. State Board of Equalization*, 657 F.2d 204, 206 n.1 (8th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981). Accordingly, this section will be referred to hereafter as "Section 306," and all citations will be to Section 306 as originally enacted. App. at 20a.

been treated discriminatorily for ad valorem tax purposes in relation to other commercial and industrial property in Oklahoma because state tax authorities had overvalued its property in Oklahoma relative to other commercial and industrial property in the state. The District Court dismissed BN's case prior to trial for lack of subject matter jurisdiction based upon a prior decision of the Court of Appeals [in *Burlington Northern Railroad v. Lennen*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984) ("*Lennen*")] holding that, although discriminatory impact is generally sufficient to establish a claim under Section 306, discriminatory overvaluation claims are cognizable under Section 306 only where a railroad can make "a strong showing of purposeful overvaluation . . . with discriminatory intent [715 F.2d at 498]." App. at 10a.

In its decision in the instant case, the Court of Appeals declined to disturb the *Lennen* holding on motion for *en banc* consideration and found that "the district court correctly applied *Lennen* by requiring Burlington Northern to make a strong showing of intentional discrimination through overvaluation to establish jurisdiction." App. at 2a. The Court of Appeals also "agree[d] with the district court that Burlington Northern failed to establish a strong initial showing of prima facie case of intentional discrimination" (App. at 3a)," and affirmed the District Court's dismissal of BN's state tax discrimination claim under Section 306.

The "discriminatory intent" jurisdictional requirement applied by the court below is contrary to the language and purpose of Section 306 and provides a ready means by which state tax authorities within the Tenth Circuit may (through the simple expedient of systematic overvaluation of railroad property for tax purposes) wholly negate or seriously curtail the availability of federal remedies against state tax discrimination provided by Section 306. Moreover, the "discriminatory intent" test ap-



plied by the court below is in direct conflict with recent decisions of the Eighth and Ninth Circuits specifically rejecting a "discriminatory intent" requirement for Section 306 overvaluation claims and is also inconsistent with decisions in other Circuits construing the purpose and scope of Section 306 as to preclude in equal fashion all forms of state tax discrimination. In short, if the "discriminatory intent" test applied by the court below is allowed to stand, it will seriously interfere with the operation of Section 306 as Congress intended and will leave railroads operating within the Tenth Circuit without an effective remedy against state tax discrimination. The AAR therefore strongly supports the petition for a writ of certiorari.

### ARGUMENT

#### I. The "Discriminatory Intent" Jurisdictional Requirement Applied By The Court Below Is Contrary To The Language And Purpose Of Section 306 And Provides A Ready Means By Which State Tax Authorities May Negate The Federal Remedies Against State Tax Discrimination Provided By Section 306

##### A. Section 306 Of The 4-R Act

It has long been recognized that state property taxation of railroads has operated, over the course of many years, "in a fashion inherently discriminatory against the railroads." *Clinchfield R. Co. v. Lynch*, 700 F.2d 126, 128 (4th Cir. 1983); S. Rep. No. 91-630, 91st Cong., 1st Sess. at 1-8 (1969). It has also long been recognized that the effects of discriminatory state taxation upon the railroad industry has been massive and persistent,<sup>3</sup> and that such

<sup>3</sup> In a 1969 Senate Report it was found that over the previous nine year period the railroad industry had been assessed more than \$900 million in discriminatory state and local property taxes. S. Rep. No. 91-630, at 3. Congress also noted that the railroads "are easy prey" for state and local tax assessors because they are "nonvoting, often nonresident, targets for local taxation, and cannot easily remove their right-of-way and terminals." *Id.*

tax discrimination operated to seriously weaken the national transportation system (as well as unfairly burden shippers and consumers with excessive transportation costs). See, e.g., S. Rep. No. 91-630, at 3-8.

In 1976, Congress set out "to eliminate the long-standing burden on interstate commerce resulting from discriminatory state and local taxation" of railroads by enactment of Section 306 of the Railroad Revitalization and Regulatory Reform Act ("4-R Act").<sup>4</sup> Section 306(1)(a) provides that a state engages in unlawful tax discrimination if it assesses:

transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

Section 306 also makes unlawful the imposition of a state ad valorem tax on railroad property at a tax rate higher than that generally applicable to other commercial and industrial property in the same assessment jurisdiction (306(1)(c)) and broadly prohibits the "imposition of any other tax which results in discriminatory treatment of a common carrier by railroad . . ." (306(1)(d)). Section 306 further provides that federal district courts may grant injunctive relief to prevent violations of Sec-

<sup>4</sup> The quoted language comes from the statement of purpose of a predecessor bill to Section 306 as set forth in S. Rep. No. 630, 91st Cong., 1st Sess. 1 (1969). As consistently recognized by the courts, the relevant legislative history of Section 306 is principally set forth in the extensive consideration Congress gave to prior bills with language virtually identical to Section 306. See *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 865 n.6 (9th Cir. 1983), *cert. denied*, 464 U.S. 846 (1983); *Olgivie v. State Bd. of Equalization*, 657 F.2d at 206, n.1 (8th Cir. 1981).



tion 306, notwithstanding the provisions of the Tax Anti-Injunction Act, 28 U.S.C. § 1341.<sup>5</sup>

**B. The Lennen Decision Relied Upon By The Court Below**

In affirming the District Court's dismissal of BN's tax discrimination suit because of BN's alleged failure to "establish a strong initial showing of prima facie case of intentional discrimination (App. at 3a)," the court below relied solely upon its prior decision in *Lennen*, which it found controlling. App. at 2a. Because the opinion below provides no additional statutory analysis in support of the Court's "intentional discrimination" test for overvaluation claims arising under Section 306 (App. at 2a-3a), resort to the decision in *Lennen* is necessary for analysis of the statutory construction issue raised by the instant case.

In construing the scope of Section 306, the *Lennen* court specifically recognized that Congress intended to equalize both tax rates and assessment ratios between railroad and other commercial and industrial properties in the same assessment jurisdiction. 715 F.2d at 496-97. The court, moreover, specifically recognized that "Section 306 was enacted to prevent both de jure and de facto discrimination against railroads in the collection of ad valorem taxes" (*Id.* at 497), and specifically identified at least one form of de facto discrimination against railroad property that would fall within the broad provisions of Section 306:

The most common form of de facto discrimination is imposing the same percentage rate of tax on both classes of property, but applying that rate to a value less than the true market value of other commercial and industrial property while applying it to the full true market value of rail property.

<sup>5</sup> 28 U.S.C. § 1341 generally deprives federal district courts of jurisdiction to enjoin state taxation unless there is a showing that a "plain, speedy, and efficient remedy" is not available in the state courts.

*Id.* at 497. Thus the *Lennen* court clearly recognized that de facto undervaluation of commercial and industrial property is prohibited by Section 306 and that such conduct on its face would provide a basis for federal injunctive relief under Section 306. *Id.*

The *Lennen* court, however, while acknowledging that discriminatory overvaluation of railroad property constitutes "another potential form of discrimination, also de facto" (*id.* at 497), declined to allow a Section 306 discriminatory overvaluation claim to be maintained in the case before it based solely upon proof of actual discriminatory impact. The court reasoned that "it is by no means clear that § 306 was intended to provide relief from every form of de facto discrimination" (*id.*) and further found that the legislative history of Section 306 does not indicate that Congress addressed "the problem or benefits of involving the district courts in the intricacies of the process of arriving at the valuation of rail property." *Id.* at 497. The court also found "no express indication . . . that Congress intended the railroads to escape the general noninterference rule of [28 U.S.C.] § 1341 to the extent that they could challenge the manner in which state assessment officials arrived at the fair market value of their property in federal court on a yearly basis." *Id.* at 498. The Court therefore concluded that "[a]bsent a specific directive from Congress, we are unwilling to infer that it intended district courts to sit as state tax assessment boards for railroad property." *Id.* The *Lennen* court, however, in implicit recognition that Section 306 must be construed to provide at least some ostensible form of relief for discriminatory state taxation claims based upon overvaluation, adopted the "discriminatory intent" requirement that is the subject of the instant appeal. *Id.* at 498.<sup>6</sup>

<sup>6</sup> The *Lennen* court held that section 306 was intended to provide only what the court characterized as "equalization" relief (meaning relief from de jure discrimination, or de facto discrimination

**C. The "Discriminatory Intent" Test Applied By The Court Below Is Contrary To The Language And Purpose Of Section 306**

Nowhere in the language or legislative history of Section 306 is there any indication that Congress intended to qualify or limit the broad antidiscrimination relief granted by that remedial legislation through the imposition of a "discriminatory intent" jurisdictional requirement. The prohibitory language of Section 306 is sweeping in its scope, proscribes discriminatory consequences of state taxation without reference to the intent of state tax officials and is specifically directed (*inter alia*) at "assessment ratio" discrimination between railroad property and other commercial and industrial property (306 (1)(a)). Such assessment ratio discrimination, as the *Lennen* court implicitly recognized, can occur with equal effectiveness either through state undervaluation of non-railroad property with respect to "true market value" or through state overvaluation of railroad property with respect to "true market value." To hold, as the *Lennen* court did, that Section 306 directly prohibits the results of one type of discrimination, but not the other (absent a "strong showing" of discriminatory intent) creates an unwarranted distinction where none was made by Congress, and simply cannot be squared with the general statutory language used, which applies equally to proscribe the consequences of both forms of discrimination.

Moreover, contrary to the findings of the *Lennen* court, the statutory scheme clearly demonstrates that Congress,

accomplished through undervaluation of non-railroad property). 715 F.2d at 497. The court expressly stated that "valuation" relief (i.e., relief from de facto discrimination accomplished through overvaluation of railroad property) did not fall within the scope of Section 306. *Id.* Although the court set forth its statutory construction in categorical terms, it nevertheless proceeded to fashion the "intentional discrimination" test at issue as a jurisdictional prerequisite for discriminatory state taxation claims based upon overvaluation. *Id.* at 498.

through enactment of Section 306, fully contemplated and intended that the federal courts would be required to consider valuation claims pertaining to railroad property where relevant to a Section 306 discrimination claim. Section 306(2)(d) specifically provides, without exception, that "the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable state law." Section 306 (2) (d). Because proof of assessment ratio discrimination necessarily requires a showing of disparate "assessed value-true market value" ratios between railroad and nonrailroad property, it is evident that Congress, in enacting the burden of proof requirements of Section 306(2)(d), fully and necessarily intended that such requirements would govern proof of "assessed value" and "true market value" for both railroad and nonrailroad property.<sup>7</sup> Congress thus fully anticipated, and made general provision for, proof of "true market value" of railroad property as relevant to Section 306 overvaluation claims. Any contention to the contrary is simply unsupported given the inclusive and specific statutory language used and the broad legislative purpose of Section 306 "to eliminate . . . discriminatory state and local taxation."<sup>8</sup>

<sup>7</sup> Moreover, the legislative history makes clear that Congress viewed true market value as an objective, single standard against which assessed values would be compared in determining discrimination claims under Section 306. See, S.Rep. No. 1483, 90th Cong., 2d Sess. 10, 22 (1968). As such, district courts would necessarily have to make an independent determination of true market value where necessary to provide effective relief under Section 306: to take the states' determination as conclusive would be self-defeating.

<sup>8</sup> The only specific limitation established by Congress with respect to the jurisdiction of federal courts to enjoin discrimination claims is set forth in Section 306(2)(c). That provision provides that "no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction."



**D. The "Discriminatory Intent" Test Applied By The Court Below Provides A Ready Means By Which State Tax Authorities May Negate The Federal Remedies Provided By Section 306**

Not only is the "discriminatory intent" requirement imposed by the Court below contrary to the language and purpose of Section 306, it also provides an easy means by which state authorities may negate the federal remedies against state tax discrimination provided by Section 306.

As is apparent, state tax authorities, by systematic valuation of railroad property in excess of true market value, may achieve discriminatory results *identical* in scope to that obtainable through other forms of discrimination proscribed by Section 306 (e.g., application of a higher tax rate to railroad property or systematic undervaluation of nonrailroad property). Yet, under the *Lennen* rationale, such discriminatory overvaluation, unlike other forms of discrimination, would not provide a basis for a claim under Section 306 unless the railroads could, by a "strong prima facie case", demonstrate "discriminatory intent" as well as discriminatory impact.

As exemplified by the District Court decision below, the "discriminatory intent" requirement requires the railroads to challenge and rebut not only the correctness, but also the "good faith" of the valuation methodologies and procedures used by state tax authorities. App. at 9a, 16a. Such a jurisdictional requirement, which permits state authorities ample opportunity to devise "good faith" valuation methodologies that in fact systematically discriminate against railroad property, provides a ready loophole through which state tax authorities may channel discriminatory tax efforts free from federal interference. Indeed, in the instant case the District Court, in denying relief under Section 306, found that "there is some indication that the Plaintiffs' property has in fact been overvalued." App. at 16a.

As Congress noted in enacting Section 306, railroads are "easy prey" for state discriminatory tax practices. See note 3 *supra*. Indeed, for the year 1981 (the last year for which such figures are publicly available), the assessed value of railroad assets subject to state ad valorem taxes in all state jurisdictions totalled \$6,624,000,000. *1982 Census of Governments*, U.S. Department of Commerce, Bureau of the Census, at Table 2, p.3. For states within the Tenth Circuit, the 1981 assessed value of such railroad property totalled \$558,000,000. *Id.* These figures do not include the assessed value of locally assessed railroad property. Moreover, the potential revenues available to states through ad valorem property taxes on railroads are enormous. In 1985, based on aggregate Class I railroad figures set forth in Annual Reports (R-1) filed with the Interstate Commerce Commission, total ad valorem taxes assessed in 1985 for all Class I railroads in all state jurisdictions totalled \$232,294,000. Thus, the incentive for state tax discrimination is as great today as it was in 1976 when Congress first enacted Section 306.

As the legislative history makes clear, Congress specifically enacted Section 306 because it found that the states, if left to their own devices, would not take effective action against discrimination against railroad property. See, e.g., S. Rep. No. 91-630, at 7-8. The *Lennen* decision, by imposition of the restrictive "discriminatory intent" requirement for discriminatory overvaluation claims, brings the legislative process around full circle by providing the states a ready means of imposing discriminatory taxes while totally avoiding federal injunctive remedies under Section 306.

**II. The Decision Below Conflicts With Those Of Other Circuits**

Contrary to the *Lennen* decision relied upon by the court below, which found "it . . . by no means clear that § 306 was intended to provide relief from every form of de facto discrimination" (715 F.2d at 497), every



other circuit court that has considered the issue has concluded that the purpose of Section 306 was "to prevent tax discrimination against railroads in any form whatsoever" and in "all of its guises." *Olgivie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981), cert. denied, 454 U.S. 1086 (1981); *Trailer Train Co. v. Bair*, 765 F.2d 744, 745 (8th Cir. 1985); *Richmond, Fredericksburg v. Department of Taxation*; 762 F.2d 375, 379 (4th Cir. 1985); *Alabama Great Southern Railroad Co. v. Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981); *Southern Railway Company v. State Board of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983), cert. denied, 465 U.S. 1100 (1984). Indeed, consistent with the scope and purpose of Section 306 recent decisions of both the Eighth and Ninth Circuits have specifically rejected the "discriminatory intent" test fashioned by the *Lennen* court as a jurisdictional bar to a Section 306 claim based upon discriminatory overvaluation.

In *Burlington Northern R. Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985), the Eighth Circuit considered a Section 306 tax discrimination claim by BN alleging that the state had engaged in unlawful tax discrimination through tax assessments which valued BN's property in excess of true market value while other commercial and industrial property in the state were assessed for tax purposes at lower levels. BN claimed that as a result of such state valuation practices the ratio of assessed value to true market value of BN's property exceeded the ratio of assessed value to true market value of all other commercial and industrial property in the state by at least five percent contrary to non-discrimination requirements of Section 306. *Id.* at 1225. State tax authorities, in response to BN's tax discrimination claim, asserted in defense that Section 306 did not confer jurisdiction on the federal courts to review state valuations of either railroad or other commercial property to determine if assessed value/true market value ratios were in fact "equalized" be-

tween railroad property and other commercial and industrial property in the state. *Id.*

The Eighth Circuit, finding that review of state valuation determinations in the context of ratio discrimination claims brought under Section 306 (which the court broadly characterized as requests for "equalization" relief under Section 306) were essential if the nondiscrimination requirements of Section 306 were to be properly implemented, squarely rejected the state's position. *Id.* at 1225-1226. In so doing the Eighth Circuit also squarely rejected the "intentional discrimination" test imposed by the *Lennen* court as a jurisdictional prerequisite to a Section 306 claim based upon discriminatory overvaluation of railroad property. As held by the Eighth Circuit in *Bair*:

[I]f we were to accept the [state's] position, section 306 would be a mere shadow of the relief from discriminatory taxation which Congress intended. See S.Conf.Rep. No. 595, 94th Cong. 2d. Sess. 136, 165-66, reprinted in 1976 U.S. Code Cong. & Ad. News 148, 151, 180-81. Unless the district court makes its own findings regarding valuation, states would be free to discriminate against railroads by assessing a value far in excess of the true market value, while assessing all other property at true market value, and then asserting, as Iowa does, that assessed value is always equal to true value. Regardless of whether it occurs purposefully or by honest error, section 306(1)(a) forbids this type of discrimination.

\* \* \* \*

In order to make the comparison for equalization purposes under section 306(1)(a), the district court must make findings of fact on: (1) the assessed value of plaintiff's property; (2) the true market value of plaintiff's property; (3) "the assessed value of all other commercial and industrial property in the same assessment jurisdiction"; and (4) "the true market value of all such other commercial and in-

dustrial property." The district court must calculate the two ratios and determine whether they vary by at least five percent. § 306(2)(c) . . . . Because there is no intent element in Section 306, Burlington Northern need only prove the accurate values, not purposeful undervaluation or overvaluation.

766 F.2d at 1225-1226.\*

The decision below is also in direct conflict with a recent Ninth Circuit decision in *Atchison, Topeka and Santa Fe Railway v. Board of Equalization*, 795 F.2d 1442 (9th Cir. 1986) ("*Santa Fe*"). In the *Santa Fe* case, the railroad petitioners brought a tax discrimination suit under section 306 claiming that "the true market value calculated by state tax authorities was higher than

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\* In its decision below, the Tenth Circuit specifically noted that "there is language in [*Bair*] that may be read as inconsistent with our intentional discrimination ruling in *Lennen*." App. at 3a. The court below, however, in an effort to negate the clear conflict in the circuits, characterized the inconsistent *Bair* language as "dicta" and noted that the *Bair* decision had also specifically distinguished the *Lennen* case. App. at 3a.

The effort of the court below to reconcile the *Lennen* and *Bair* decisions, however, is patently unpersuasive. First, the *Bair* court specifically remanded the case to the district court to correct its error "in failing to make findings of fact on assessment values and true market values." 766 F.2d at 1226-1227. Far from constituting *dicta*, therefore, the language cited in *Bair* regarding the need for true market value findings in Section 306 cases based on claims of discriminatory overvaluation of railroad property is in fact the *direct holding* of that case. Second, although the *Bair* case refers to the *Lennen* case as "dealing with overvaluation claims rather than the equalization claim at issue in the present case [766 F.2d at 1225]," the distinction is wholly semantical. Both cases in fact involved requests for "equalization" relief based upon discriminatory overvaluation of railroad property in relation to other commercial and industrial property in the state. Moreover, the *Bair* court (in remanding the case for valuation determinations) resolved the issue in a manner directly in conflict with the *Lennen* court (which interposed the "intentional discrimination" test as a jurisdictional bar and affirmed the district court's dismissal of BN's request for injunctive relief).

the real true market value and therefore they paid higher taxes proportionately than other commercial and industrial property owners." *Id.* at 1445. The railroads further claimed that Section 306 "provided a remedy for discrimination that results from overvaluation of rail transportation property, caused by generally not applying the methodology correctly or by negligently or intentionally inflating figures." *Id.* The Ninth Circuit, in categorically upholding the railroads' discriminatory overvaluation claim under Section 306, held as follows:

We conclude that the district court erred in holding that the railroads' valuation challenge was outside the scope of the 4-R Act. The 4-R Act gives federal district courts the power to enjoin certain discriminatory state taxation practices, 49 U.S.C. § 11503(c). Section 11503 specifically refers to the "true market value" of rail property and identifies that factor as an integral element of the statutory test for discriminatory taxation. The normal presumption is that true market value—like all factual issues bearing on a claimed statutory violation—would be open to dispute and proof before a federal court hearing a 4-R Act claim. Therefore, the statute confers federal jurisdiction to hear challenges to the state's calculation of the railroad property's true market value.

*Id.* at 1445.

The Ninth Circuit also specifically addressed and rejected the "intentional discrimination" jurisdictional test adopted by the *Lennen* court:

The purposes of the 4-R Act . . . support the power of the district court to hear the valuation claim involved here. Congress enacted the statute to end what it perceived to be the pervasive and longstanding practice of discriminatory taxation of railroads. Given the important remedial objective of the legislation, it is implausible to assert that the Act was not intended to provide relief from every form of



de facto discrimination. Such a holding would frustrate the purposes of the statute and lead to irrational consequences.

Indeed, the only circuit to consider a claim of overvaluation recognized that such claims were cognizable under the Act, albeit only if a certain threshold showing was made. See *Burlington Northern R. Co. v. Lennen*, 715 F.2d 494, 498 (10th Cir. 1983) (holding that railroad could prevail on an overvaluation claim in federal courts provided it "can make a strong showing of a purposeful overvaluation of a particular railroad's property with discriminatory intent"), *cert. denied*, 104 S. Ct. 2690 (1984). We decline to adopt the Tenth Circuit's threshold requirement; however, we agree that federal courts have jurisdiction over claims of rail property overvaluation.<sup>10</sup>

*Id.* at 1446; see also *Louisville & Nashville R. Co. v. Dept. of Rev. Etc.*, 736 F.2d 1495, 1498 (11th Cir. 1984) (noting generally that "[d]iscriminatory intent is not a precondition to recovery [under Section 306] once disparate impact is shown"); *Southern Ry. Co. v. State Board of Equalization*, 715 F.2d 522, 527 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) ("Congress meant unconditionally to ensure a federal forum for Section [306] claims," including cases "alleging de facto discrimination as well as de jure.")

Based upon the statutory language, legislative history and inclusive remedial purpose of Section 306, this Court

<sup>10</sup> The panel majority in the *Santa Fe* case, however, found that the district court should abstain from determining the merits of the valuation issue until the conclusion of pending state valuation cases. *Id.* at 1448. The court reasoned that although "Congress intended the 4-R Act to provide a federal remedy for discriminatory state taxation of railroad property," the railroads "cannot be heard to complain if a federal court defers to a state court in which the railroads themselves first sought relief." *Id.* A petition for rehearing on the abstention issue in *Santa Fe* was filed August 14, 1986, and the court has requested briefing on the issue.

should reverse the decision below as contrary to the requirements of Section 306 and as inherently disruptive of the federal statutory scheme. Moreover, because the decision below is in direct conflict with those of other circuits, action by this Court is necessary to ensure the uniform and proper administration of Section 306 by the federal judiciary and to provide railroads operating within the Tenth Circuit an effective federal remedy against state tax discrimination as Congress intended.

### CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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October 2, 1986



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No. 86-337

Supreme Court, U.S.  
FILED

DEC 12 1986

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Petitioner,*

v.

OKLAHOMA TAX COMMISSION, *et al.*,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

**JOINT APPENDIX**

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December 12, 1986

PETITION FOR CERTIORARI FILED AUGUST 30, 1986  
CERTIORARI GRANTED OCTOBER 20, 1986

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

\_\_\_\_\_  
No. 85-1657  
\_\_\_\_\_

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff-Appellant,*

v.

OKLAHOMA TAX COMMISSION, *et al.*,  
*Defendants-Appellees.*

\_\_\_\_\_  
**DOCKET ENTRIES**

DATE	FILINGS-PROCEEDINGS
5/6/85	CS.DKT Case docketed
10/21/85	BR.F Appellant's brief filed, orig +9cc,c/s ROA.DSGN.F Appellant's designation of the record on appeal filed, orig
11/7/85	M.BC.PARTY.F Motion of Assoc. of American Railroads for leave to file amicus curiae brief filed 11/6/85, orig +9cc,c/s and submitted to panel (with brief in support of appellant's suggestion for hearing <i>en banc</i> )
11/7/85	M.F.ANY.F Appellant's suggestion for hearing <i>en banc</i> filed, orig +12cc,c/s
11/12/85	M.F.ANY.SUBM Appellant's suggestion for hearing <i>en banc</i> submitted to <i>en banc</i> panel
11/18/85	BR.F. Appellees' brief filed, orig. & 25cc. c/s.



DATE	FILINGS-PROCEEDINGS
11/21/85	M.BC.PARTY.DISP—granted motion of Association of American R.R. to file amicus curiae brief in support of suggestion for hearing en banc—McKay, Seymour
11/21/85	M.SUBM.CS.BR.F—appellees' motion to submit case on briefs filed—orig. & 3 cc.—c/s
11/22/85	M.SUBM.CS.BR.RES.F—appellant's response to appellees' motion to submit on briefs filed requesting oral argument—orig. & 3 cc.—c/s
12/5/85	BR.F Appellant's reply brief filed, orig + 9cc,c/s
12/9/85	M.F.ANY.DISP Appellant's motion for hearing en banc denied—en banc panel. (parties served by mail).
12/11/85	M.SUBM.CS.BR.DISP—denied appellees' motion to submit on briefs—McKay, Seymour
12/27/85	HRG.SET.MAR'86 TERM, DENVER
3/20/86	CS.ARG.SUBM—case argued and submitted—McKay, Logan, Baldock
5/2/86	OPN.F. Unpublished, signed opinion filed. McKay, Logan, Baldock JM.DISP. Judgment affirmed.
5/20/86	M.STAY.MDT.F.SUBM. Appellant's motion for stay of issuance of mandate pendin filing for cert filed. 0&3 c/s—and submitted to panel.
6/4/86	M.STAY.MDT.DISP Ordered appellant's motion for stay of issuance of mandate pending filing of cert is denied. McKay, Logan, Baldock (parties notified by mail) MDT.ISS Mandate issued to district court
6/11/86	MDT.RCPT.F Mandate receipt filed

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

\_\_\_\_\_  
No. 83-419R  
\_\_\_\_\_

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*

v.

OKLAHOMA TAX COMMISSION, *et al.,*  
*Defendants.*

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
3-03-83		COMPLAINT
3-09-83		PLAINTIFF'S Mtn for Leave to Deposit Money into Registry of Ct-ws w/BRIEF in Supp of Plf's Mtn for Leave to Deposit Monies into Registry of Ct
[3-09-83]		AFFIDAVIT of T.C. Wehner in Supp of Plf's Mtn for Leave to Deposit Monies into Registry of Ct
3-11-83		TEMPORARY Restraining Order & Order Grant Leave to Deposit Money into Registry of Ct, clk dird to send attest copy of TRO to Co Treas of each Co w/i State of OK in which Burlington Northern Railroad Company operates (RUSSELL)sls
3-10-83		CERTIFICATE of Mail of AFF of Certain Co Treas in Supp of Dfts' Objec to Payment of Tax Monies into Registry of Ct

DATE	NR	PROCEEDINGS
[3-10-83]		BRIEF of Dft, OK Tax Commission in Oppos to Plf's Mtn for Leave to Deposit Money into the Registry of Ct-w/s
[3-10-83]		ENTER EVID HRG ON PLFS MTN FOR TRO & PLFS MTN TO DEPOSIT MONEY, test presented by dft OK Tax Commn; OK Tax Comm's Ex 1-15 adm; dft State Bd of Equal's Ex 1 adm; plfs Exh 1 adm; arguments presented; mtns grant per order be filed this date (RUSSELL)ve
[3-25-83]		TENDERED \$484,258.04 by Burlington Northern, St. Paul, MN
3-25-83		MOTION TO DISM for Lack of Subj Matter Juris or in Altern for Failure to a State clam upon Which Relief can be Grant, by dfts OK Tax Commr Robert L. Wadley & J. L. Merrill-w/LEAVE grant to file w/o Supp Brief; Supp Brief to be filed before 4-14-83 (RUSSELL)w/s
3-29-83		PLAINTIFF'S Oppos to Dfts' Mtn to Dism for Lack of Subject Matter Juris or in Altern for Failure to State Clm Upon Which Relief Can be Grant-w/s
3-25-83		ORDER Respect Deposit of Funds into Registry of Ct & Investment of Such Funds in Banking Institution, auth signator of acct clk of USDC or US Dist Judg; no w/drals w/o ct order w/cert of Financial Dep Clk (RUSSELL)jm
4-07-83		DFTS State Bd of Equal of State of OK; Nigh, Chairman of State Bd of Equal of State of OK; Bernard; Winters, Craig, Scott, Fisher & Turpen, members of State Bd of Equal of OK, Mtn to Dism-w/s

DATE	NR	PROCEEDINGS
[4-07-83]		DEFENDANTS State Bd of Equal of OK, Nigh, Chairman of State Bd of Equal of OK, Bernard, Winters, Craig, Scott, Fisher & Turpen, member of State Bd of Equal of OK, Brief in Supp of Mtn to Dism w/ ORDER grant lv to file brief in excess of 20 pgs (RUSSELL)w/s
4/11/83		ENTER ORDER, all ptys dird to resp w/supp brief to Mtn to Dism by dft State Bd of Equal, George Nigh, et al on or before 4-22-83; if resp not recd by that date, mtn deem confessed (RUSSELL)ve
4-21-83		BRIEF in support of Dft's Okla. Tax Comm., Mtn to Dism w/s/ (O.K. to file Russell)
4-21-83		RESPONSE of Dft Okla. Tax Comm to Compl for Inj and Decl Relief w/s/
4-21-83		APPENDICES to Resp of Dft. Okla. Tax Commn. to Compl for Inj and Declaratory Relief
4-29-83		BRIEF in Opposition to Mtn to Dism by Dfts State Bd. of Equalization of the State of Okla.; Geo. Nigh, Chairman of The State Board of Equaliz. of the St. of Okla.; Spencer Bernard; Leo Winters; Jack Craig; Clifton Scott; Dr. Leslie Fisher; and Mike Turpen, Members of the St. Bd. of Equalization of the State of Okla., by Plaintiffs w/s/
4-29-83		NOTICE by Clerk to The Hon. Wm. French Smith, Atty Gen. (re constitutionality of question 49 U.S.C. 11503 by a Mtn to Dism w/Brief)w/s
5-06-83		ADDENDUM TO Plaintiff's Brief In Opposition To Motion To Dismiss Filed by Deft Oklahoma Tax Commission (VOL I)

DATE	NR	PROCEEDINGS
5-06-83		ADDENDUM To Plaintiff's Biref In Opposition To Motion To Dismiss Filed by dft Oklahoma Tax Commission (VOL II)
5-12-83		DEFENDANTS' St Board of Equalization of the State of Okla; George Nigh, Chairman Of The Board of Equalization of the St of Okla; Spencer Bernard; Leo Winters, Jack Craig; Clifton Scott; Dr. Leslie Fisher; and Mike Trupen, Members of the State Bd of Equalization of the State of Okla. REPLY BRIEF In Support of Their Motion To Dismiss-w/s
08-30-83		ENTER Order—plf & dft to file brfs w/i (7) days of this date addressing the effect of the 10th Cir opinion of Burlington Northern Railroad Co. v. Lennen — F.2d —, #82-2534 (10th Cir 8-25-83) on this litigation, specifically on dft's mtn to reconsider order to compel (RUSSELL) ve
09-01-83		APPLICATION For Ext of Time to File Brfs As Dir by Court's Order dated 8-30-83; by plf-w/s
09-02-83		ORDER—grtg appl for ext of time for ptys to resp to Ct's Order of 8-3-83; all ptys have until 9-14-83 to file brfs as direct by Ct's Order of 8-30-83 (RUSSELL) ve
09-14-83		PLAINTIFF'S Brf Explaining the Effect of Burlington Northern Railroad Co., et al v. Lennen, et al, #82-2534 (10th Cir., 8-25-83) on this Proceeding-w/s
09-14-83		RESPONSE Brf of the Okla Tax Comm-w/s
10-13-83		MOTION for Lv to Amnd Compl, by plf-w/s
10-13-83		MEMORANDUM in Supp pf Mtn for Lv, to Amnd Compl, by plf-w/s

DATE	NR	PROCEEDINGS
10-27-83		RESPONSE of Dfts, Ok Tax Comm, Odie A. Nance, Robert L. Wadley, & J.L. Merrill, to plf's Mtn for LV to amend complaint-w/s
11-09-83		AMENDMENT To Complaint by plf-w/s
03-01-84	7	REQUEST for Oral Argument by plf-w/s
03-01-84	8	SUPPLEMENTARY Brf & Statement of Facts In Opposition to Mtns To Dismiss filed by dfts, Oklahoma Tax Commission & Its Members -w/s
03-01-84	9	AFFIDAVIT of T. C. Wehner in Supp of Suppl Brf & Statem of Facts In Oppos to Mtns To Dismiss filed by dfts, Okla. Tax Commission & Its Members -n/s
03-21-84	14	RESPONSE of Dfts to Plf's Supplementary Brf & Statement of Facts in Opposition to the Mtn to Dismiss of the Oklahoma Tax Commission, by dfts Oklahoma Tax Comm. & State Bd. of Equalization-w/s
01-08-85	21	ORDER: that dfts' Mtn to Dism in CIV-83-419-R and CIV-83-2165-R are both grtd; that separate judgments will be entered reflecting the action in the Ct (RUSSELL) ne
01-08-85	22	JUDGMENT: that this action is dism for lack of subj matter jurisdiction (RUSSELL) (MICRO/JAN '85) ne
01-17-85	24	PLAINTIFF'S Mtn to Stay Ord of Dism Pending Disposition of Post-Trial Mtns-w/s
01-17-85	25	MEMORANDUM in Support of Mtn for Stay, by plf-w/s
01-17-85	26	PLAINTIFFS' Mtn for New Trial, or in the Alternative, for Vacation, Amendment, or Alteration of Judgment-w/s



DATE	NR	PROCEEDINGS
01-17-85	27	MEMORANDUM in Support of Mtn for New Trial, or in the Alternative, for Vacation, Amendment, or Alteration of Judgment
01-18-85	28	ORDER of Stay: that the judgment of Ct entered 01-08-85, which dismiss this action is stayed pending resolution of the plf's mtn filed under Rule 59 of the FRCP; that the consent prelim inj entered by the Ct on 03-15-83, rest & enjoining the collection of plf's 2nd-half installment of 1982 ad valorem tax payments, will remain in full force & effect pending resolution of the plf's post-trial mtn; that the disputed tax monies will remain in the registry of the Ct pending fur ord by the ct (RUSSELL) cg
02-11-85	32	DEFENDANT'S Brf in Reply to Mtn for New Trial, by Okla Tax Comm, Odie Nance, Robert T. Wadley, J. L. Merrill, and State Bd. of Equalization-w/s
02-19-85	34	PLAINTIFFS Reply to the Dfts' Resp to Plfs' Alternative Mtns for New Trial & for Vacation, Amendment or Alteration of Judgment-w/s
04-29-85	35	ORDER that Plf's Mtn for New trial, or in the alternative for Vacation, Amendment, or Alteration of Judgment is denied to the extent that it challenges dismissal of No. CIV-83-419-R; that Plf's Mtn for New trial, or alternatively for Vacation, Amendment, or Alteration of Judgment is granted to the extent it challenges dismissal in No. CIV-83-2165-R; that the order of dismissal in No. CIV-83-2165-R is vacated; that plf's Mtn for Consolidation is denied; that Case No. CIV-83-2165-R is stayed & administratively closed pending appeal of the Ct's decision in Case No.

DATE	NR	PROCEEDINGS
		CIV-83-419-R; ptys directed to keep Ct apprised of appellate proceedings in No. CIV-83-419-R (RUSSELL) ne
05-01-85	36	NOTICE of Appeal by plf fm judg ent 1-8-85 & denial of plf's mtn to alter or amend judg on 4-29-85 -w/s
05-01-85	37	PLAINTIFF'S Mtn for Inj Pending Appeal -w/s
05-01-85	38	BRIEF in Supp of Mtn for Inj Pending Appeal -w/s
05-01-85		RECEIVED \$70 filing & dktg fee on appeal. Receipt #42484.
05-01-85	39	CLERK'S ltr re serv of Notice of Appeal, w/cpy ltr, Notice & dkt sheet to cnsl & CCA -mlc #85-1657
05-15-85	40	ORDER Setting Oral Arg on Plf's Mtn for Inj Pending Appeal; that oral args on plf's mtn for inj pending appeal will be heard on 05-24-85 at 9:00 a.m. (RUSSELL) ne
05-17-85	41	DEFENDANT'S Resp to Plf's Mtn for Inj Pending Appeal-w/s
05-17-85	42	BRIEF in Support of Dft's Mtn for Inj Pending Appeal-w/s
05-24-85	43	INJUNCTION Pending Appeal; that the inj entered on 03-15-83 shall remain in full force & effect during pendency of the appeal (RUSSELL) jh
03-15-86	45	CLERK'S Letter Transmitting Record on Appeal to CCA, consisting of 3 Volumes w/ copy letter, Index & docket to cnsl & CCA -aa

DATE	NR	PROCEEDINGS
03-31-86	46	CCA's order re appellant Burlington Northern Railroad Co's mtn to supplement Record on Appeal; grtd, Clk of Dist Ct is ord to cery & transm as supplement docs, 1. Deposition of J.L. Merrill, filed in Dist Ct case Civ-83-2165-R; 2. Deposition of David Taylor, filed in Dist Ct case Civ-83-2165-R; 3. Deposition of Robert Hartman, filed in Dist Ct case Civ-83-2165-R. (McKay, & Seymour) sa
03-31-86	47	CLERK'S ltr transm Supplemental Record, Vol 3, to CCA, w/cpy ltr & Index to cnal -sa
06-09-86	48	MANDATE of CCA (Judgm Affirmed) (McKay, Logan & Baldock) (CCA #85-1657)

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-419R

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*

vs.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; ROBERT T. WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,  
*Defendants.*

[Filed Apr. 21, 1983]

RESPONSE OF DEFENDANT OKLAHOMA TAX  
COMMISSION TO COMPLAINT FOR INJUNCTIVE  
AND DECLARATORY RELIEF

Defendant Oklahoma Tax Commission, Odie A. Nance, Chairman of the Oklahoma Tax Commission, Robert L. Wadley, Vice-Chairman of the Oklahoma Tax Commission, and J. L. Merrill, Secretary-Member of the Oklahoma Tax Commission, for answer and defense to the allegations set forth in the Complaint For Injunctive and Declaratory Relief denies each and every such allegation

except as hereinafter expressly admitted. The following numbered paragraphs of this Response correspond to the numbered paragraphs of the Complaint.

1. Defendant admits 49 U.S.C. § 11503 grants this Honorable Court jurisdiction, concurrent with state courts of Oklahoma, to prevent ad valorem tax discrimination against rail transportation property where and only if:

(a) the *assessment ratio* of assessed value to true market value of such rail transportation property is greater than or exceeds by at least five percent (5%) the assessment ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction; or,

(b) the *tax millage rate* (levy) of any local taxing jurisdiction applied to the assessed valuation of rail transportation property is greater than or exceeds the tax millage rate of same local taxing jurisdiction applied to commercial and industrial property in the same assessment jurisdiction.

Defendant specifically denies that it is a proper party to this purported action as Defendant neither assesses, levies or collects ad valorem tax. Defendant is the fact gathering arm of the State Board of Equalization. Defendant's duty is to receive annual ad valorem tax reports the various railroad and public service corporations that operate within the State of Oklahoma and thereupon to make findings of valuation and recommendations of assessment to the State Board of Equalization for assessment purposes. 68 O.S.1981, § 2454. Further, as assistance to the State Board, Defendant has a duty to make investigations and inspections when necessary to assure that no such property escapes taxation. 68 O.S.1981, §§ 2454 and 2455. Defendant has no statutory duties or powers to assess, levy or collect ad valorem taxes in the State of Oklahoma. The Oklahoma Constitution, Article X, § 21 mandates the State Board of Equalization assess

property of railroads; and, Article X, § 9 prohibits the state from levying any ad valorem tax.

Defendants specifically denies that any of its acts are subject to the prohibition in 49 U.S.C. § 11503.

Active concert and active participation under Rule 65(d) of the Federal Rules of Civil Procedure is a question of fact for the Court, and Defendant requests Plaintiff be required to make a strict showing thereof. Defendant denies that any person not named as a Defendant herein has or is acting in active concert or active participation regarding any of the allegations set out in the Complaint herein. 61 A.L.R. Fed. 402.

On April 25, 1982, the Oklahoma Tax Commission laid its recommendations for 1982 ad valorem tax assessments of railroad and public service corporation property before the State Board of Equalization. (Defendant's Appendices: A.)

On May 19, 1982, the State Board of Equalization assessed the property of railroad and public service corporations for ad valorem tax purposes. (Defendant's Appendices: B.)

The 1982 ad valorem tax assessment recommended by the Oklahoma Tax Commission on April 25, 1982 and assessed by the State Board of Equalization on May 19, 1982 is not excessive nor unlawful under 49 U.S.C. § 11503 as:

(a) The average statewide assessment ratio applied to true market value (use value) of commercial and industrial property as determined from the 1981 ratio study of the levels of local assessments of commercial and industrial property is 10.87%. (Defendant's Appendices: C.)

(b) That assessment percentage, 10.87%, was applied to the true market value (use value) of the railroad property of Plaintiff for calculation of 1982 assessed valuation.



## JURISDICTION

2. Defendant specifically denies that this Court has subject matter jurisdiction over the purported Complaint filed herein. (Defendant's Motion to Dismiss and Brief in Support filed herein.)

(a) 49 U.S.C. § 11503 does not confer subject matter jurisdiction upon the federal courts except to prevent the four specified acts declared therein to be unreasonably burdensome and discriminate against interstate commerce, to-wit:

- "(1) excessive assessment percentage or ratio;
- (2) levy upon an assessed value calculated with an excessive assessment percentage;
- (3) excessive millage levy; or
- (4) imposition of another discriminatory tax.

As set out in paragraph numbered 1., Plaintiff's rail transportation property, for 1982 ad valorem tax purposes in Oklahoma, was assessed at 10.87 assessment ratio which is the same, exact statewide average assessment ratio applied to local assessed commercial and industrial property as determined from the most current completed study of levels of assessment by county assessors within Oklahoma as of April 23, 1982.

(b) 28 U.S.C. § 1341 bars subject matter jurisdiction granted under 28 U.S.C. § 1337.

(c) 28 U.S.C. § 1341 bars subject matter jurisdiction granted under 28 U.S.C. § 1331.

## PARTIES

3-10. Defendant admits Plaintiff's allegations in paragraphs numbered 3-10.

## AD VALOREM TAXATION IN OKLAHOMA

11. Defendant admits that 64 O.S.1981, § 2404 specifies property subject to ad valorem taxation in Oklahoma. The Oklahoma Constitution, Art. X, Section 6 specifies property exempt from a valorem taxation and Art. V, Section 50 prohibits the Legislature from enacting any law exempting property from taxation except as provided in the Constitution.

12. Defendant admits that 68 O.S.1981, § 2427 mandates the county assessor shall assess all property subject to local assessment. Defendant specifically denies that § 2427 is pertinent or applicable herein.

13. Defendant admits that 68 O.S.1981, § 2444 is the legislative mandate, required by Oklahoma Constitution Art. V, § 59, that the local millage (tax levies) be uniform upon all taxable property within the taxing jurisdiction. Defendant specifically responds that it is this uniformity that precludes subject matter jurisdiction herein under 49 U.S.C. § 11503, (b) (3).

Defendant specifically denies that every railroad, including Plaintiff, does make its return on or before March 15 of each year. Defendant specifically responds that under 68 O.S.1981, § 2453, the Oklahoma Tax Commission may extend the time for 15 days. Plaintiffs filed its verified return form on March 31, 1982, returning no value for track and right of way; and later other information was filed. (Defendant's Appendices: D.)

14. Defendant specifically admits that under 68 O.S. 1981, § 2454 the Oklahoma Tax Commission is enjoined with mandatory, discretionary duties to assist the State Board of Equalization in the assessment of real and personal rail transportation property of plaintiff. Defendant specifically responds that the Oklahoma assessment procedure requires three steps: (1) full valuation X (2) assessment percentage = (3) assessed valuation. (*Cantrell v. Sanders*, 610 P.2d 227 (Okla: 1980).

Defendant specifically responds that the procedures for recommendations of assessment of rail transportation property, the Oklahoma Tax Commission determines full system unit value allocated to Oklahoma and applies the assessment percentage thereto to calculate recommended assessed value:

- (1) original cost of assets  $\times$  40%
- (2) capitalized net operating income  $\times$  60%
- (3) =system value  $\times$  allocation factor  $\times$  assessment percentage = assessed value.

(Capitalized net operating income is calculated by weighing the last three years income the most recent year 3, next most recent year 2 and last most recent year 1, capitalized at 14% for 1982 calculation.)

(Original cost is based upon cost paid during early statehood for a great portion of Plaintiff's rail transportation property.)

(Allocation is based upon seven factors as reported by the Plaintiff.) (Defendant's Appendices: D and E.)

Further Defendant specifically responds that the Oklahoma Tax Commission has a clear, specific statutory duty to make its recommendation to the State Board of Equalization as to assessment of railroad property of Plaintiff, on or before April 25 of each year. (68 O.S.1981, § 2454); that the 10.87 assessment percentage or ratio was recommended to the State Board of Equalization for the specific, stated purpose of compliance with the 4-R Act, 49 U.S.C. § 10101, et seq. (Defendant's Appendices: A); that during 1981, in its equalization of the local assessments, the State Board of Equalization rejected the findings and recommendations of the Oklahoma Tax Commission for equalization; that the validity of the 1981 Ratio Study of the levels of local assessment was attacked and presented to the Oklahoma Supreme Court in *Poulos v. State Board of Equalization, et al.*, 646 P.2d 1269

(Okla: 1982) (Poulos III) decided May 25, 1982, six days after the May 19, 1982 assessment involved herein; that at the statutorily required time for making recommendations, (April 25, 1982) the Oklahoma Tax Commission did not have resolution as to the validity of its 1981 Study and that the 1982 Study was incomplete as same is not required or even possible to complete until the third Monday in June of each year, (68 O.S.1981, § 2473) the mandated time for filing of abstracts of assessments by the county assessors with the Oklahoma Tax Commission; and that, in order to, in good faith, comply with 49 U.S.C. § 11503, recommendation was made for assessment of all rail transportation property of any railroad operating within Oklahoma at the same percentage of Oklahoma full value (use value/true market value) as the statewide average local assessment percentage for commercial and industrial property.

15. Defendant specifically admits Plaintiff's paragraph number 15.

16. Defendant specifically admits that 68 O.S.1981, § 2456 requires the State Board of Equalization to certify the assessed values of property of railroads and public service corporations to the various county assessors on or before the *third Monday* in June of each year; that the assessment of such property is complete when the State Board of Equalization is mandated to meet on the *fourth Monday* in June to equalize local assessments, 68 O.S. 1981, § 2463.

17. Defendant specifically admits that 68 O.S.1981, § 2462 enjoins certain powers and duties upon the Oklahoma Tax Commission regarding equalization of local assessments. Defendant specifically denies that § 2462 is pertinent or applicable herein, except that it is the statutory duty which causes the annual studies of levels of local assessments to be completed by the Oklahoma Tax Commission.



18. Defendant specifically denies that 68 O.S.1981, § 2463 is pertinent or applicable herein; and, Defendant advises that in Poulos III the highest court of this state had before it issues and allegations based upon no evidence as to levels of local assessments *except* the 1981 Study of the Oklahoma Tax Commission; at page 1273, the Court decreed:

"There being no valid reason shown for not adopting the 12% ratio as recommended by the Commission, we hereby determine by judicial decree that all property within the State of Oklahoma subject to ad valorem taxes shall be assessed at 12% of its taxable value with permissible inter-county deviations of not more than 3% above or below the mean, and that said percentage shall apply to the 1982 tax year and thereafter until such time as the same shall be changed by the recommendation of the Commission and the determination by the Board based upon good and sufficient valid, legal grounds as provided in 68 O.S.1971, § 2463."

further Defendant advises that in 1982, Plaintiffs protested, under 68 O.S. 1981, § 2466, valuation of its Oklahoma rail transportation property; that administrative hearing was not had prior to filing the Complaint herein; that the 1982 administrative protests of public service corporations were resolved in *McLoud Telephone Company v. State Board of Equalization, et al.*, decided December 16, 1982; that in *McLoud*, the 26% assessment percentage applied to Oklahoma full value of taxable property of the public service corporations, other than railroads, to calculate assessed value was upheld; and, that the Court held that assessments by the State Board of Equalization were unaffected by the cases involving uniformity or equalization of local assessments. (*Poulos v. State Board of Equalization*, 552 P.2d 1134 (Okla: 1975); *Poulos v. State Board of Equalization*, 552 P.2d 1138 (Okla: 1976); *Cantrell v. Sanders*, 610 P.2d 227 (Okla: 1980) and *Poulos III*.)

19. Defendant specifically admits that 68 O.S.1981, § 24303 authorizes ad valorem taxes do not become *delinquent* if one-half paid on or before January 1 and one-half paid on or before March 31 of each year.

#### SECTION 306

20. Defendant specifically responds that Section 306 quoted by Plaintiff was amended in 1978 prior to the effective date of the Section and that 49 U.S.C. § 11503 is clear, unambiguous and speaks for itself. (Defendant Appendices: F.)

21. Defendant specifically admits the definition of assessment as set forth in § 11503, *supra*, but denies that assessment is defined to mean any valuation other than the assessed valuation upon which the tax millage is applied as used in § 11503(b)(2).

22. Defendant specifically denies the definition of "transportation property" as alleged; § 11053(a)(3) defines "rail transportation property". Defendant specifically denies that all operating property of the Burlington Northern that is subject to ad valorem taxation by the State of Oklahoma is "transportation property" within the meaning of § 11503; Burlington Northern Company report for 1980 indicates the diversified business interests to have property subject to ad valorem taxation in Oklahoma that is not "rail transportation property". (Defendant's Appendices: G.)

23. Defendant specifically admits the definition of "commercial and industrial property" as set out in § 11503. Defendant responds that in 1981, the assessment percentages applied to the use valuation (true market value) of locally assessed commercial and industrial property by the 77 county assessors had a statewide average of 10.87%; that in 1981 the assessment percentage applied to the Oklahoma full value (true market value) of railroad and public service corporation property ranged



from 8.25% to 35%, the Constitutional maximum, constituting a range of deviation of 26.75% (Defendant's Appendices: H); that for 1982 ad valorem tax assessment purposes, the Oklahoma Tax Commission treated property of railroads and public service corporations as separate and distinct classes of property because such classifications are specifically referred to in the Constitution and Statutes of this state and decisions of the Oklahoma Supreme Court; that the 1982 recommendations of the Oklahoma Tax Commission and the 1982 assessments of the State Board of Equalization removed any discriminatory effect created by a range of assessment percentages within each of the two classes by assessing the property of any corporation within each class at a single, uniform assessment percentage (i.e., railroads at 10.87% and public service corporations at 26%). Defendant's Appendices: H and J.)

24. Defendant specifically denies Plaintiff's paragraph numbered 24. Defendant specifically responds that the congressional studies (Plaintiff's Appendix) showed rail property in Oklahoma was assessed at 60% of full value in 1950, while other property was assessed at 20%; that the congressional reports (Plaintiff's Appendix) showed rail property in Oklahoma was assessed at 35% in 1968 while other property was assessed at 18%; that upon enactment of the "4-R Act in 1976, State of Oklahoma began a program to eliminate any discriminatory tax burden on rail transportation property due to ad valorem tax assessments; that the current valuation formula to determine system unit value allocated to Oklahoma was initiated as well as reduction in the assessment percentage (Defendant's Appendices: I); and, that in 1981, the mean assessment percentage applied to rail transportation property was 10.29%; Burlington Northern was assessed at 10.99%. (Defendant's Appendices: J.)

## ASSESSMENT OF BURLINGTON NORTHERN'S PROPERTY FOR THE 1982 TAX YEAR

25. Defendant specifically denies Plaintiff's paragraph numbered 25. Defendant specifically responds that for the 1981 assessment, based on information from the ICC R-1 report as of December 31, 1980, the Oklahoma Tax Commission made findings that the Oklahoma allocated value of the system unit value of Burlington Northern's rail transportation property was \$136,563,361.00; this finding was based upon system unit value of \$3,641,689,619.00 allocated to Oklahoma at 3.75%; that the Oklahoma Tax Commission recommended and the State Board of Equalization assessed the Burlington Northern at 10.99% of its Oklahoma value or \$15,014,650.00 assessed value (Defendant's Appendices: J and K); and, that the Burlington Northern had returned its self-assessed value of Oklahoma taxable property at \$14,335,355.00 (Defendant's Appendices: L.) (Prior to the 1959 Amendment to the Oklahoma Constitution limiting assessment to 35%, the "returned value" was ideally "100% value". With the 35% limit, "returned value" became the recommended "assessed value" by the taxpayer or the self-assessment. (Exhibit A to Affidavit of Hal L. Hefner filed April 11, 1983.) Plaintiff's admitted an assessed value in 1981 of \$14,335,355.00 which is greater than the 1982 assessed value of \$13,717,367.00.

26. Defendant specifically denies Plaintiff's paragraph numbered 26.

27. Defendant specifically responds that the ratio study set out hereinbefore was conducted by the Oklahoma Tax Commission and that the statewide average assessment percentage applied to commercial and industrial property by the various county assessors was 10.87% in 1981.

28. Defendant specifically denies Plaintiff's paragraph numbered 28. Defendant specifically responds that for the

1982 assessment, based on information from the ICC R-1 report as of December 31, 1981, the Oklahoma Tax Commission made findings that the Oklahoma allocated value of the system unit value of Burlington Northern's rail transportation property was \$126,194,731.00; this finding was based upon system unit value of \$3,574,921,544.00 allocated to Oklahoma at 3.53%; that the Oklahoma Tax Commission recommended and the State Board of Equalization assessed the Burlington Northern at 10.87% of its Oklahoma value or \$13,717,367.00 assessed value. (Defendant's Appendices: B and M.)

29. Defendant specifically denies Plaintiff's paragraph numbered 29, except, Defendant specifically admits the assessment by the State Board of Equalization on May 19, 1982. (Defendant's Appendices: B.)

30. Defendant specifically admits Plaintiff's paragraph numbered 30.

31. Defendant specifically admits that the Plaintiff protested the May 19th assessment and specifically deny all other allegations contained in Plaintiff's paragraph numbered 31.

32. Defendant specifically responds that Defendant has no exact knowledge of Plaintiff's paragraph numbered 32.

33. Defendant specifically denies Plaintiff's paragraph numbered 33.

#### BURLINGTON NORTHERN'S SECTION 306 (§ 11503) CLAIM

34-43. Defendant specifically denies each and every allegation set forth in Plaintiff's paragraph numbered 34 through 43. Defendant specifically responds that Plaintiff's paragraphs numbered 34 through 43 present a pure valuation (appraisal) controversy, unaccompanied by any

discrimination; that the State of Oklahoma has lowered year after year the assessed values of railroad property in compliance and specifically has *continually* lowered the tax burden of Burlington and its predecessor, the St. Louis and San Francisco Railroad Company; that the decrease in tax burden of this Plaintiff has been *very* substantial; that Congress determined that there existed instances of excessive assessments and, hence, tax discrimination in 1965 and for this reason 1965, as a benchmark for the expression of certain values, which are, of course, not constant due to the effects of inflation on "Dollar" figures, is used to demonstrate the serious reduction in tax burden that Plaintiff has enjoyed due to the 4-R Act; that, a real Dollar comparison shows to what very significant degree Oklahoma has lowered Burlington's "assessment"; that, where an assessment decreases, assuming tax rates are unchanged, then taxes paid will accordingly be decreased; that since Burlington has made no averment of tax rate discrimination, it must be assumed that the purported "discrimination" arises solely from the assessment figure itself; that a historical analysis shows that even discounting inflation, Burlington's system values have inexorably been lowered over a thirty-three (33) year period (see Exhibit "A" to Affidavit of Hal L. Hefner); that when these figures are adjusted for inflation based upon the rate of inflation, as calculated by the Implicit Price Deflator for Railway Equipment, United States Department of Labor, then the amounts are compared on a constant Dollar basis, and the extreme reductions Oklahoma has made in Plaintiff's assessment amounts are readily apparent; (Affidavit of Gene Tyner, Sr.); that, for example, in 1965 Dollars, the assessment of Frisco was \$29,680,459.00. In 1981, Burlington's assessment was \$15,014,650.00 (\$4,438,866.17; 1981 Dollars equivalent value in 1965 based upon Implicit Price Deflator Indices); that in 1982, the disputed year, Burlington's assessment was \$13,717,367.00 (\$3,703,689.00; 1982 Dollars equivalent value in 1965); that these figures



show that the 1965 assessment of \$29,680,495.00 has been reduced in the subsequent seventeen years to a figure (expressed in comparable values) of \$3,703,689.00; that this is a *decrease* of approximately 799.93% in Burlington's assessment amount from the benchmark year, 1965, wherein Congress found tax discrimination; that the 1981 assessment figure of \$15,014,650.00 expressed in 1982 Dollars is: \$16,410,562.50; that the 1982 disputed assessment (also in 1982 Dollars), therefore, expresses a *reduction* of approximately 16% in assessment amount over the prior tax year (Exhibit "F" to Tyner Affidavit); that when actual assessment amounts (affidavit of Hal Hefner) are compared, there has been a constant reduction up to and *including* the tax year (1982) in question; that when comparisons are calculated discounting the effects of inflation (affidavit of Gene Tyner, Sr.) then these constant reductions expressed in the same value, are even more significant; that *never* in modern history has either the Oklahoma Tax Commission (through its recommendation) or the Oklahoma State Board of Equalization (through its assessment) raised or inflated Burlington's Oklahoma system assessment amount from that of the previous year; that the decline of Burlington's assessment has been continuous and significant; that when rates of reduction from the 1965 assessment (Tyner Affidavit, Exhibit "F") are compared to rates of reduction of the railroad's rendered value (Tyner Affidavit, Exhibit "E"), Oklahoma's rate of decrease is greater up to 1982. However, in 1982, the State Board's assessment drops another 2.25% to 12.50% of what it assessed in 1965. Nevertheless, Burlington proposes its value to drop to 10.71% of what it rendered in 1965 or, stated differently, to approximately one-third that which it rendered the prior year (29.25% to 10.71%).

44. WHEREFORE, Defendant prays that this Court deny and refuse to grant any relief to Plaintiffs and dismiss Defendant with cost.

OKLAHOMA TAX COMMISSION

/s/ J. Lawrence Blakenship  
J. LAWRENCE BLANKENSHIP  
General Counsel

/s/ Donna E. Cox  
DONNA E. COX  
Attorney  
2501 Lincoln Boulevard  
Oklahoma City, OK  
73194-0011  
(405) 521-3141

[Certificate of Mailing Omitted in Printing]



IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-419R

BURLINGTON NORTHERN RAILROAD COMPANY,  
vs. *Plaintiff,*

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIRMAN  
OF THE OKLAHOMA TAX COMMISSION; ROBERT T.  
WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX  
COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF  
THE OKLAHOMA TAX COMMISSION; STATE BOARD OF  
EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE  
NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZA-  
TION OF THE STATE OF OKLAHOMA; SPENCER BERNARD;  
LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE  
FISHER; and MIKE TURPEN, MEMBERS OF THE STATE  
BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,  
*Defendants.*

APPENDICES TO RESPONSE OF DEFENDANT  
OKLAHOMA TAX COMMISSION TO COMPLAINT FOR  
INJUNCTIVE AND DECLARATORY RELIEF

[Filed Apr. 21, 1983]

J. LAWRENCE BLANKENSHIP  
General Counsel

DONNA E. COX  
Attorney

2501 Lincoln Boulevard  
Oklahoma City, OK 73194  
(405) 521-3141

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\* Not reproduced as part of this item of the Joint Appendix.

[SEAL]

OKLAHOMA TAX COMMISSION  
 STATE OF OKLAHOMA  
 2501 Lincoln Blvd.  
 Oklahoma City, Oklahoma 731940001

April 23, 1982

Odie A. Nance, Chairman  
 Robert L. Wadley, Vice-Chairman  
 J. L. Merrill, Sec'y-Member

*HAND DELIVERED*

State Board of Equalization  
 State Capitol Building  
 Oklahoma City, Oklahoma 73105

[Filed Apr. 26, 1982]

Re: Annual Assessment of  
 Railroad and Public Service  
 Corporations.

Dear Sirs:

Attached are the findings of the Oklahoma Tax Commission as to the assessment of all railroad and public service corporation property pursuant to 68 O.S. 1968, § 2454 for your final action under Section 21, Article X of the Constitution.

Also, you find attached a copy of a Memorandum dated April 23, 1982, from our Management Services Division which explains the steps we are recommending to achieve uniformity in assessment ratios.

A copy of this letter with the above Memorandum is being furnished each Board member.

Respectfully,

OKLAHOMA TAX COMMISSION

/s/ Odie A. Nance  
 ODIE A. NANCE  
 Chairman

/s/ Robert L. Wadley  
 ROBERT L. WADLEY  
 Vice Chairman

/s/ J. L. Merrill  
 J. L. MERRILL  
 Secretary-Member

## OFFICE CORRESPONDENCE

## OKLAHOMA TAX COMMISSION

Subject Equalizing Assessment Ratios  
Applied to Railroads and  
Public Service Companies

To Odie A. Nance, Chairman  
Robert L. Wadley, Vice Chairman

From J. L. Merrill, Secretary-Member  
Reece Womack, Economist  
Management Services Division

Date April 23, 1982

Division No. 18

In March 1982 the Commissioners of the Oklahoma Tax Commission made an examination of the assessment ratios applied to railroads and public service companies in the 1981 assessment year. It was found that the ratios for railroads ranged from a low of 8.25% to a high of 19.75%.

In the case of public service companies, the ratios ranged from a low of 11.54% to a high of 34.99%. It was decided at this time that this wide a range did not represent sufficient equality of treatment within like classes of property.

The Commissioners asked the Economic Research Section to devise a range of ratios for each of these classes of property (railroads and public service companies) that had the following characteristics:

- (1) all ratios would be within a 6% range, i.e.,  $\pm 3\%$

- (2) This range would be such as to not cause a decrease in total assessed value for the assessment year 1981.

The following ranges were developed. These ranges were calculated using 1981 assessment year data to the nearest 1/100 of one percent. This range for railroads is 8.32%-14.32%. This range of ratios resulted in an increase of only \$3,615 over the 1981 total assessed value of \$58,821,138. The resulting range for public service companies is 23.59%-29.59%. This range of ratios resulted in an increase in total assessed value of \$200,969. This represents an increase of 1/10,000 of one percent over 1981 total assessed value.

The Commissioners also requested that single ratio be developed for these two classes of property that would not result in a decrease in total 1981 assessed value. The resulting ratio for railroads was 11.32%. The resulting ratio for public service companies was 26.5% (this ratio was only calculated to the nearest 1/10 of one percent).

The following decisions were then made by the Commissioners. Railroads would all be set at a single ratio. The ratio developed by the Economic Research Section was modified due to a Federal ruling. The Federal Courts have ruled that railroads can not be assessed at a higher rate than comparable commercial/industrial property in the same locality. Since railroads usually have property in several counties in the state, it was decided to apply the statewide average ratio for industrial/commercial property to railroads. This average was 0.87% in 1981. (Note: 1982 data will not be available till June 1982.)

In the case of public service companies, the 1981 ratio range was more extreme than in the case of railroads. Also, the absolute dollar amounts involved in moving immediately to a single ratio would be more disruptive.



Hence, the Commissioners decided to use the range developed by the Economic Research Section of no more than 6 percentage points ( $\pm 3\%$ ) deviation between all public service companies. This range is 23.59% to 29.59%. New companies were assigned the midpoint of this range; i.e., 26.59%. The desire was expressed on the part of the Commissioners to move to a single assessment ratio for public service companies in the near future.

The practical effect of the above procedures is as follows:

- (1) any company whose 1981 assessment ratio was below 23.59% was raised to 23.59% for 1982.
- (2) any company whose 1981 assessment ratio was above 25.59% was decreased to 29.59% for 1982.
- (3) any company whose 1981 assessment ratio was within the 23.59% to 29.59% range retained the same assessment ratio for 1982.
- (4) any new company was assigned the assessment ratio of 26.59% (the midpoint of the range) for 1982.

If there are any further questions about the above outlined methodology, please let me know.

[SEAL]

**OKLAHOMA TAX COMMISSION**  
**STATE OF OKLAHOMA**  
 2501 Lincoln Blvd.  
 Oklahoma City, Oklahoma 731940001

Odie A. Nance, Chairman  
 Robert L. Wadley, Vice-Chairman  
 J. L. Merrill, Sec'y-Member

**SUMMARY OF FINDINGS AND RECOMMENDATIONS OF THE OKLAHOMA TAX COMMISSION FOR ASSESSMENT OF PROPERTY OF RAILROAD AND PUBLIC SERVICE CORPORATIONS**

1. The laws of this state provide that the State Board of Equalization assess all railroad and public service corporation property. Section 21, Article 10, Oklahoma Constitution and 68 O.S. 1981, § 2455.

2. The laws of this state provide that the Oklahoma Tax Commission shall make its findings as to the assessment of all railroad and public service corporation property and make recommendations to the State Board of Equalization for assessment of such property. 68 O.S. 1981, § 2454.

3. In the findings and recommendations of the Oklahoma Tax Commission, property of railroads and public service corporations are treated as separate and distinct classes of property because:

a. The clasifications of "railroads" and "public service corporations" are referred to in both the Constitution of Oklahoma and the Oklahoma Statutes; and

b. The Interstate Commerce Act, Title 49 of the United States Code, and federal court decisions require that property of railroads be assessed at a per-

centage of the total value that is no greater than the percentage at which private, commercial property is assessed.

4. The Oklahoma Tax Commission recommends assessment of property of railroads at 10.87% of the total value, which the Commission finds to be consistent with federal enactments and court decisions.

5. The Oklahoma Tax Commission recommends assessment of property of public service corporations at percentages ranging from 23.59% to 29.59%.

6. Submitted herewith are findings and recommendations of the Oklahoma Tax Commission regarding assessment of property of all railroad and public service corporations in the State of Oklahoma previously transmitted to each member of the State Board of Equalization on April 26, 1982.

Respectfully submitted this 19th day of May, 1982.

TABLE 1  
OKLAHOMA TAX COMMISSION RECOMMENDATIONS TO THE BOARD OF EQUALIZATION  
CONCERNING ASSESSED VALUATIONS OF RAILROADS  
FOR THE ASSESSMENT YEAR 1982  
(THE 1982 RATIOS ARE BASED ON A RATE OF 10.87%)

	1982 Fair Cash Value	1982 Ratio	Recom- mended Assessed Value Before Penalty	Penalty, Value Plus If Any	Recom- mended Assessed Value Plus Penalty
# 1 The Arkansas Western Railway Company	108557.	10.87%	11800.	0.	11800.
# 2 The Atchison, Topeka & Santa Fe RR Co.	166884316.	10.87%	18140325.	0.	18140325.
# 3 Burlington-Northern Railroad Company	126194733.	10.87%	13717367.	0.	13717367.
# 4 Chicago, Rock Island & Pacific RR Co.	31929578.	10.87%	3470745.	0.	3470745.
# 5 Fort Smith & Van Buren Railway Company	376856.	10.87%	40964.	0.	40964.
# 6 Hollis & Eastern Railroad Company	111159.	10.87%	12083.	0.	12083.
# 7 The Kansas City Southern Railway Company	29223999.	10.87%	3176649.	0.	3176649.
# 8 Missouri-Kansas-Texas Railroad Company	50065932.	10.87%	5442167.	0.	5442167.
# 9 Missouri Pacific Railroad Company	70106568.	10.87%	7620584.	0.	7620584.
# 10 Northwestern Oklahoma Railroad Company	255529.	10.87%	27776.	0.	27776.
# 11 Oklahoma City Junction Railway Company	47087.	10.87%	5118.	0.	5118.
# 12 St. Louis Southwestern Railway Company	7534230.	10.87%	818971.	0.	818971.
# 13 Sand Springs Railway Company	1783898.	10.87%	193910.	0.	193910.
# 14 Texas, Oklahoma & Eastern Railroad Co.	40470562.	10.87%	4399150.	0.	4399150.
# 15 Tulsa-Sapulpa Union Railway Company	520925.	10.87%	56625.	0.	56625.

[Oklahoma Tax Commission Recommendations to the Board of Equalization Concerning Assessed Valuations of Public Service Companies For the Assessment Year 1982 omitted.]

[Item C, 1981 Ratio Study and Transmittal Letter of June 20, 1981, omitted.]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-419R

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*

vs.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIRMAN  
OF THE OKLAHOMA TAX COMMISSION; ROBERT T.  
WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX  
COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF  
THE OKLAHOMA TAX COMMISSION; STATE BOARD OF  
EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE  
NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZA-  
TION OF THE STATE OF OKLAHOMA; SPENCER BERNARD;  
LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE  
FISHER; and MIKE TURPEN, MEMBERS OF THE STATE  
BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,  
*Defendants.*

AFFIDAVIT OF HAL L. HEFNER

Hal L. Hefner, of lawful age, being first duly sworn  
upon his oath, deposes and states:

1. Affiant is an employee of the Oklahoma Tax Com-  
mission and presently serves as the Director of the Ad  
Valorem Tax Division of the Oklahoma Tax Commission.

2. That as part and parcel of his duties as Director,  
Ad Valorem Tax Division, affiant is the official custodian  
of all books, records or documents kept or maintained by  
said Division, and accordingly, makes the following state-  
ments of his own personal knowledge.

3. The attached is a true and accurate copy of the  
executed State Summary Sheet of the Annual Return of  
the Burlington Northern Railroad, Inc. for 1982 ad  
valorem tax purposes; and a true and correct copy of the  
information submitted by the Burlington setting out the  
percentages for the allocation factor to Oklahoma; that  
said information is part of the 1982 ad valorem tax re-  
turn filed by said railroad and is maintained as part of  
the files of the Ad Valorem Tax Division of the Okla-  
homa Tax Commission.

Further, affiant sayeth not.

/s/ Hal L. Hefner  
HAL L. HEFNER

STATE OF OKLAHOMA, )  
 ) ss:  
COUNTY OF OKLAHOMA. )

Subscribed and sworn to before me this 21st day of  
April, 1983.

/s/ Linda Hardy  
Notary Public

My Commission Expires: March 27, 1985



BURLINGTON NORTHERN RAILROAD COMPANY  
AS REQUESTED IN LETTER FROM OKLAHOMA  
TAX COMMISSION DATED JANUARY 8, 1982

1. Comparative System Balance Sheet at close of business December 31, 1981. (Will be forwarded as soon as completed.) There is no comparative *system* balance sheet as of December 31, 1980.
2. Schedule of Operating Equipment Leased from Others. (CS 0325.2 Attached.)
3. Schedule of Equipment Leased to Others. (CS 0325.3 Attached.)
4. 1977 thru 1981 Systems Earnings Statement. (Attachment 1.) Combines BN, SLSF and C&S.
5. Oklahoma proportion based on the following factors:
 

(a) All track mileage	4.52%
(b) Main track mileage	4.99%
(c) Car miles	3.26%
(d) Locomotive miles	3.50%
(e) Traffic units	2.25%
(f) Gross operating revenue	3.53%
(g) Total investment	2.65%

(\*)

6. Total 1981 average market value of outstanding stock and debt as of December 31, 1981.  
(CS 0308.3) Will be forwarded as soon as completed.
7. All information regarding this question is being furnished directly from Mr. Wehner of our Springfield office.
8. Signed copy of OTC Form 913-S.
9. Information regarding the 1981 mergers is covered in our Shareholders Report.

Copy of Burlington Northern RR and Colorado & Southern Railroad's R-1 Report will be mailed as soon as they are completed.

Enclosed is copy of Burlington Northern RR Co. Annual Report (R-1) which has been filed with the I.C.C. for 1982. A copy of the Shareholders Report is enclosed.

- (\*) 5-A. Please see Schedule # 330 for additions and betterments to the railroad system and Oklahoma. We do not maintain records on cost of reproduction new, less depreciation.

Thank you for allowing the extension of time for filing this report.

Should you need additional information for determining value, please contact Raymond E. Durbala, Manager Tax Administration, Burlington Northern RR Co., 176 East Fifth Street, St. Paul, Minnesota 55101.

[Further Attachments to Affidavit Omitted]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-419R

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*

vs.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIRMAN  
OF THE OKLAHOMA TAX COMMISSION; ROBERT T.  
WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX  
COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF  
THE OKLAHOMA TAX COMMISSION; STATE BOARD OF  
EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE  
NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZA-  
TION OF THE STATE OF OKLAHOMA; SPENCER BERNARD;  
LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE  
FISHER; and MIKE TURPEN, MEMBERS OF THE STATE  
BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,  
*Defendants.*

AFFIDAVIT OF HAL HEFNER

Hal L. Hefner, of lawful age, being first duly sworn  
upon his oath, deposes and states:

1. Affiant is an employee of the Oklahoma Tax Commission and presently serves as the Director of the Ad Valorem Tax Division of the Oklahoma Tax Commission.
2. That as a part and parcel of his duties as Director, Ad Valorem Tax Division, affiant is the official custodian of all books, records or documents kept or maintained by said Division, and accordingly, makes the following statements of his own personal knowledge.
3. The attached is a true and accurate copy of the Railroad Assessment Work Sheet in blank, that was

utilized by the Ad Valorem Tax Division for valuation of the railroad property of each railroad doing business in Oklahoma and subject to ad valorem tax assessment in 1982.

Further, affiant sayeth not.

/s/ Hal L. Hefner  
HAL L. HEFNER

STATE OF OKLAHOMA, )  
 ) ss  
COUNTY OF OKLAHOMA. )

Subscribed and sworn to before me this 21st day of  
April 1983.

/s/ Linda Hardy  
Notary Public

My Commission Expires: March 27, 1985

Year

RAILROAD ASSESSMENT WORK SHEET

Company \_\_\_\_\_

SYSTEM ASSETS:

I.C.C. Acct. No.	Account or Item	
712	Material and Supplies	
736	Total Transp. Property, Less Recorded Deprec. & Amortiz.	
	Less 90% of Construction in Progress included above:	
736	Construction in Progress	x 90% =
738	Misc. Physical Property Less Recorded Deprec.	
	Leased Equipment from others, Depreciated (Schedule)	
	Less: Leased Equip. to others, Depreciated (Schedule)	
	Net Investment, Transportation Property (System)	(z)

System Operating Income Capitalized:

Op. Revenue	Year	System Op. Income	Wt.
\$		\$	1
\$		\$	2
\$		\$	3

Weighted Average Op. Income \$

Weighted Average Op. Income Capitalized at 14 %

(x) \_\_\_\_\_

Allocation Factor

- (a) All Track Mileage
- (b) Main Track Mileage
- (c) Car Miles
- (d) Locomotive Miles
- (e) Traffic Units
- (f) Gross Operating Revenue
- (g) Total Investment

Average - Oklahoma Proportion

Okla. \_\_\_\_\_

F.C.V. of System:

Item	Wt.	%
(x)	20%	40
(z)	80%	60

System F.C.V. \$ \_\_\_\_\_ x \_\_\_\_\_ Oklahoma = Oklahoma F.C.V.

Company Returned Value

Co. Value as a % of F.C.V. \_\_\_\_\_  
Co. Value \$ \_\_\_\_\_

Assessment Percentage \_\_\_\_\_  
Oklahoma Assessed Valuation \$ \_\_\_\_\_

TOTAL PROPD.

ASSESSMENT \$

Conference Date:

\* Adjustment \$

RECOMMENDATIONS \$

OTC Hearing, Date:

\* Adjustment \$

RECOMMENDATIONS \$



[Items F and G, text of 49 U.S.C. § 11503 and portion of Burlington Northern's 1980 Company Report, respectively, omitted.]

[SEAL]

OKLAHOMA TAX COMMISSION  
STATE OF OKLAHOMA  
2501 Lincoln Blvd.  
Oklahoma City, Oklahoma 73194

James E. Walker, Chairman  
John L. Garrett, Vice-Chairman  
J. L. Merrill, Sec'y-Member

April 24, 1981

Honorable Tom Daxon, State Auditor and  
Inspector  
Secretary, State Board of Equalization  
100 State Capitol Building  
Oklahoma City, Oklahoma 73105

Dear Mr. Daxon:

Title 68, O.S. 1971, Section 2454, provides that:

"The Oklahoma Tax Commission shall make its findings as to the assessment of all railroad and public service corporation property; and such findings shall, on or before April 25th, of each year, be by said Commission laid before the State Board of Equalization as recommendations for its final action under Section 21, Article 10 of the Constitution. A copy of the Tax Commission's letter of transmittal of its findings shall, at such time, be furnished each member of said board.

Enclosed are lists of public service corporations, showing the findings of this Commisison as to the assessment of the property of such corporations, and the same are laid before the State Board of Equalization as recommenda-

tons for its final action under Section 21, Article 10 of the Constitution.

In making these findings, the Oklahoma Tax Commission has endeavored to do all things required of it, by law, in determining the taxable value of these properties; and the findings submitted herewith represent its best judgment in that respect. It is recommended that these findings be accepted by the State Board of Equalization as to the assessment of such property for ad valorem taxation for the year 1981.

Sincerely Yours,

OKLAHOMA TAX COMMISSION

/s/ James E. Walker  
JAMES E. WALKER  
Chairman

/s/ John L. Garrett  
JOHN L. GARRETT  
Vice-Chairman

SUMMARY OF AD VALOREM ASSESSMENTS  
OF THE REAL AND TANGIBLE PERSONAL  
PROPERTIES OF RAILROADS AND PUBLIC  
SERVICE CORPORATIONS, AS RECOMMENDED  
BY THE STATE BOARD OF EQUALIZATION  
BY THE OKLAHOMA TAX COMMISSION FOR  
THE YEAR 1981.

Property Type	Page	Recommended Aggregate Assessments
Railroads and Airlines	2	\$ 80,127,535
Pipeline and Transmission Companies	3-5	348,427,914
Distribution Companies	6-7	813,512,005
Telephone and Tele- Communication Systems	8-9	402,205,007

**OKLAHOMA TAX COMMISSION**  
**COMPARISON OF 1980 FINAL ASSESSMENTS**  
**WITH 1981 RECOMMENDED ASSESSMENTS**  
**REALTY AND TANGIBLE PERSONALTY**

	1980 Final	1981 Recommended	Gain or (Loss)
Railroads and Airlines	\$ 80,824,058	\$ 80,127,535	\$ (696,523)
Pipeline and Transmission Companies	333,507,702	348,427,914	14,920,212
Distribution Companies	744,578,936	813,512,005	68,933,069
Telephone and Tele-Communication Systems	367,916,309	402,205,007	34,288,698
<b>TOTALS</b>	<b>\$1,526,827,005</b>	<b>\$1,644,272,461</b>	<b>\$117,445,456</b>

46

**Railroads and Airlines**

1. Air Midwest, Inc.
2. American Airlines, Inc.
3. The Arkansas Western Railway Company
4. The Atchison, Topeka and Santa Fe Railway Company
5. Barron Aviation Services, Inc.
6. Braniff Airways, Incorporated
7. Burlington Northern Inc.
8. Chicago, Rock Island and Pacific Railroad Company
9. Continental Air Lines, Inc.
10. Delta Air Lines, Inc.
11. Eastern Airlines, Incorporated
12. Federal Express Corporation
13. Fort Smith and Van Buren Railway Company
14. Frontier Airlines, Inc.
15. Hollis and Eastern Railroad Company
16. The Kansas City Southern Railroad Company
17. Metroflite Inc. dba Metro Airlines dba Metroflite Airlines
18. Missouri-Kansas-Texas Railroad Company
19. Missouri Pacific Railroad Company
20. Northwestern Oklahoma Railroad Company
21. Oklahoma City Junction Railway Company

	1980 Assessment	1981 Return	1981 OTC Recommendation
\$ New	\$ 114,856	\$ 114,856	\$ 114,856
16,325,973	15,410,619	15,410,619	15,410,619
24,918	24,918	24,918	24,918
21,467,950	15,881,741	20,500,450	20,500,450
7,975*	—	—	—
1,600,500	1,218,769	1,218,769	1,218,769
17,561,100 <sup>b</sup>	14,335,355	15,014,650	15,014,650
5,490,500	3,566,971	4,529,900	4,529,900
500,200	502,790	502,790	502,790
195,100	112,882	112,882	112,882
New	4,339	4,339	4,339
35,560	19,329	19,329	19,329
70,150	10,880	70,150	70,150
739,500	711,545	711,545	711,545
13,795	13,295	13,295	13,295
3,265,600	1,044,685	2,523,425	2,523,425
15,950*	246,911	246,911	246,911
4,319,000	3,339,715	4,283,850	4,283,850
5,797,425	3,359,085	6,255,500	6,255,500
13,200*	9,500	12,000	12,000
22,090	16,280	20,850	20,850

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	1980 Assessment	1981 Return	1981 OTC Recommendation
<b>Railroads and Airlines</b>			
22. Ozark Air Lines, Inc.	292,030	308,880	308,880
23. St. Louis Southwestern Railway Company	New	—	711,600
24. Sand Springs Railway Company	256,600	216,480	266,750
25. Scheduled Skyways, Incorporated	New	11,963	16,500*
26. Southwest Airlines Co.	New	1,550,000	1,705,000*
27. Texas International Airlines, Inc.	275,000*	425	330,000*
28. Texas, Oklahoma & Eastern Railroad Company	1,796,500	3,694,150	4,516,100
29. Trans Central Airlines, Inc.	126,500**	—	126,500*
30. Trans World Airlines, Inc.	463,892	477,477	477,477
31. Tulsa-Sapulpa Union Railway Company	57,050	38,689	77,700
<b>TOTALS</b>	<b>\$80,824,058</b>	<b>\$66,242,529</b>	<b>\$80,127,535</b>

Legend: \* Indicates inclusion of 10% mandatory penalty for delinquency.

<sup>a</sup> No Oklahoma property

<sup>b</sup> Formerly St. Louis-San Francisco Railway Company.

<sup>c</sup> Formerly Air Central, Inc.

[Additional Tables for Pipeline, Distribution, and Telephone and Telecommunication Systems Companies, Omitted.]

# 1981 PUBLIC SERVICE ASSESSMENT RATIOS

	Median	Mean	Class Weighted Average
Airlines	25.00%	25.18%	24.94%
Railroads	11.11	12.49	10.29
Telephones	19.66	20.25	23.46
Pipelines	27.00	27.01	27.32
Distribution	28.13	26.17	28.56

## 1982 Railroad and Public Service Assessment Worksheet

## Railroads—Class: 1

Cons. No.	Company Name	Exception	Penalty	1981 Assessed Value	1981 Ratio	Income Capitalized %	Capitalized Amount	Original Cost %	Original Cost Amount	Net Book Value %	Net Book Value Amount
1	The Arkansas Western Railway Company	0	0	\$ 24,918	19.75		\$ 77,152			\$	129,494
2	The Atchison, Topeka and Santa Fe Railway Company	0	0	20,500,450	10.19		81,748,954				223,641,219
3	Burlington-Northern Railroad Company	0	0	15,014,650	10.99		62,834,504				168,434,881
4	Chicago, Rock Island and Pacific Railroad Company	1	0	4,529,900	12.75		—			100%	31,929,578
5	Fort Smith and Van Buren Railway Company	0	0	70,150	16.05		192,735				499,603
6	Hollis and Eastern Railroad Company	0	0	13,295	11.11		0				185,265
7	The Kansas City Southern Railway Company	0	0	2,523,425	8.25		19,741,002				35,545,996
8	Missouri-Kansas-Texas Railroad Company	0	0	4,283,850	8.27		8,129,395				78,023,621
9	Missouri Pacific Railroad Company	0	0	6,255,500	8.46		37,561,705				91,803,142
10	Northwestern Oklahoma Railroad Company	0	0	12,000	13.89		119,779				346,029
11	Oklahoma City Junction Railway Company	0	0	20,850	16.52		0				78,478
12	St. Louis Southwestern Railway Company	0	0	711,600	10.27		3,858,007				9,985,045
13	Sand Springs Railway Company	0	0	266,750	15.90		2,593,621				1,244,082
14	Texas, Oklahoma & Eastern Railroad Company	0	0	4,516,100	11.00		25,827,086				50,232,879
15	Tulsa-Sapulpa Union Railway Company	0	0	77,700	14.00		472,879				552,955

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

---

No. CIV-83-419R

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*

vs.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIRMAN  
OF THE OKLAHOMA TAX COMMISSION; ROBERT T.  
WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX  
COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF  
THE OKLAHOMA TAX COMMISSION; STATE BOARD OF  
EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE  
NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZA-  
TION OF THE STATE OF OKLAHOMA; SPENCER BERNARD;  
LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE  
FISHER; and MIKE TURPEN, MEMBERS OF THE STATE  
BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,  
*Defendants.*

---

AFFIDAVIT OF DAVID RAY TAYLOR  
IN SUPPORT OF OBJECTION OF DEFENDANT  
OKLAHOMA TAX COMMISSION, TO PLAINTIFF'S  
MOTION FOR TEMPORARY RESTRAINING ORDER

David Ray Taylor, having first been duly sworn de-  
poses and states as follows:

1. I am Deputy Director of the Ad Valorem Tax Divi-  
sion of the Oklahoma Tax Commission and I have been  
employed by the division for fifteen (15) years. I have  
participated in the valuation proceess within the division  
whereby employees of the division received and assim-  
ilated the ad valorem tax reports from railroad companies



and calculated the Oklahoma fair cash value with information therefrom, pursuant to the standard valuation formula for the involved year.

2. I have personal knowledge of the standard valuation formulas utilized by the Ad Valorem Tax Division in calculating Oklahoma fair cash value for railroads for the report years of 1975-1982, to-wit:

a. 1975 valuations were depreciated original cost of tangible assets;

b. Beginning in 1976 the formula for valuation of Oklahoma fair cash of railroads was changed to include two factors: original cost depreciated and capitalized income. The following formulas were utilized for the year indicated:

Year	Weight Assigned to Original Cost Depreciated	Capitalization Rate	Weight Assigned to Capitalized Income
1976	90%	8.50%	10%
1977	90%	8.50%	10%
1978	80%	9.50%	20%
1979	80%	10.00%	20%
1980	75%	10.50%	25%
1981	75%	11.00%	25%
1982	60%	14.00%	40%

The attached copy of graph, compliance with 4-R formula changes and pages from the 1980, 1981 and 1982 reports to the Oklahoma Legislature were prepared by the Ad Valorem Tax Division and indicate the reduction in levels of assessment of rail transportation property of the recent past.

Further, affiant sayeth not.

/s/ David Ray Taylor  
DAVID RAY TAYLOR

STATE OF OKLAHOMA, )  
 ) ss:  
COUNTY OF OKLAHOMA. )

Subscribed and sworn to before me this 21st day of April, 1983.

/s/ Linda Hardy  
Notary Public

My Commission expires: March 27, 1985

[Attachment, 1980 Progress Report to the Legislature on Property Revaluation, omitted.]

STATE OF OKLAHOMA  
ASSESSED VALUATION OF PUBLIC SERVICE COMPANIES



IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

---

No. CIV-83-419R

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*

v.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIR-  
MAN OF THE OKLAHOMA TAX COMMISSION; ROBERT T.  
WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX  
COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF  
THE OKLAHOMA TAX COMMISSION; STATE BOARD OF  
EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE  
NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZA-  
TION OF THE STATE OF OKLAHOMA; SPENCER BERNARD;  
LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LES-  
LIE FISHER; and MIKE TURPEN, MEMBERS OF THE  
STATE BOARD OF EQUALIZATION OF THE STATE OF  
OKLAHOMA,

*Defendants.*

---

AFFIDAVIT OF J. L. MERRILL, SECRETARY-  
MEMBER OF THE OKLAHOMA TAX COMMISSION  
IN SUPPORT OF THE RESPONSE OF DEFENDANT,  
OKLAHOMA TAX COMMISSION, TO THE COM-  
PLAINT OF PLAINTIFF

J. L. Merrill, having first been duly sworn, deposes and  
states as follows:

1. I am the Secretary-Member of the Oklahoma Tax  
Commission and, as such, I have the duty to authenticate  
records of official acts of the Oklahoma Tax Commission,



under the official seal of the Oklahoma Tax Commission, pursuant to 68 O.S. 1981, § 204.

2. The attached is the information upon which the Oklahoma Tax Commission officially acted to recommend a uniform, consistent acceptable appraisal basis for 1982 valuations of railroad property for ad valorem tax purposes.

Further, affiant sayeth not.

/s/ J. L. Merrill  
J. L. MERRILL  
Secretary-Member

STATE OF OKLAHOMA,     )  
                                  ) SS:  
COUNTY OF OKLAHOMA.    )

Subscribed and sworn to before me this 21st day of April, 1983.

/s/ Carolyn Thrift  
Notary Public

My Commission Expires: 11-25-84

# 1981 PUBLIC SERVICE ASSESSMENT RATIOS

	Median	Mean	Class Weighted Average
Airlines	25.00%	25.18%	24.94%
Railroads	11.11	12.49	10.29
Telephones	19.66	20.25	23.46
Pipelines	27.00	27.01	27.32
Distribution	28.13	26.17	28.56

## RAILROADS

Name and Sequential No.	Current Assessment (1981 O.T.C. Recom- mendation)	Cash Value (1981)	Current Ratio (1981)
3. The Arkansas Western Railway Co.	\$ 24,918	\$ 126,167	19.75%
4. The Atchison, Topeka & Santa Fe Railroad Co.	20,500,450	201,182,041	10.19
7. Burlington Northern Inc.	15,014,650	136,621,019	10.99
8. Chicago, Rock Island and Pacific Railroad Co.	4,529,900	35,528,627	12.75
13. Fort Smith and Van Buren Railway Co.	70,150	437,072	16.05
15. Hollis and Eastern Railroad Company	13,295	119,667	11.11
16. The Kansas City Southern Railway Company	2,523,425	30,586,970	8.25
18. Missouri-Kansas-Texas Railroad Company	4,283,850	51,799,879	8.27
19. Missouri Pacific Railroad Company	6,255,500	73,942,080	8.46
20. Northwestern Oklahoma Railroad Company	12,000	86,393	13.89
21. Oklahoma City Junction Railway Company	20,850	126,211	16.52
23. St. Louis Southwestern Railway Company	711,600	6,928,919	10.27
24. Sand Springs Railway Co.	266,750	1,677,673	15.90
28. Texas, Oklahoma & Eastern Railroad Company	4,516,100	41,055,455	11.00
31. Tulsa-Sapulpa Union Railway Company	77,700	555,000	14.00
<b>TOTAL</b>	<b>\$58,821,138</b>		

Chairman Nance moved that the Commission direct the Director of the Ad Valorem Division to value, as required by the applicable statute or statutes, all railroads, as a class of property, on a uniform, consistent and acceptable appraisal basis, and to return those findings to the Commission at the earliest possible time.

[Items K, L, and M, Affidavits of J.L. Merrill as to 1981 Work Sheet, Hal L. Hefner as to 1981 Self-Assessed Value, and J.L. Merrill as to 1982 Work Sheet, respectively, omitted.]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil Action No. CIV-83-419R

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*

vs.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; ROBERT T. WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,

*Defendants.*

**SUPPLEMENTARY BRIEF AND STATEMENT OF  
FACTS IN OPPOSITION TO MOTIONS TO DISMISS  
FILED BY DEFENDANTS, OKLAHOMA TAX  
COMMISSION AND ITS MEMBERS**

JAMES W. McBRIDE  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

---

 Civil Action No. CIV-83-419-R

 BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*

vs.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; ROBERT T. WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,

*Defendants.*


---

 SUPPLEMENTARY BRIEF AND STATEMENT OF  
 FACTS IN OPPOSITION TO MOTIONS TO  
 DISMISS FILED BY DEFENDANTS,  
 OKLAHOMA TAX COMMISSION  
 AND ITS MEMBERS
 

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## STATUS OF THE PROCEEDINGS

On March 25, 1983, defendants, the Oklahoma Tax Commission and its individual members (referred to collectively as the "Commission"), filed: (1) a motion to

dismiss for want of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure; and (ii) a motion to dismiss for failure to state a claim under Rule 12(b)(6). On March 29, 1983, plaintiff, Burlington Northern Railroad Company (BN) filed its objections to the Commission's motions pursuant to Rule 14(a) of the Rules of the United States District Court for the Western District of Oklahoma. The Commission submitted a memorandum of law and seven affidavits in support of its motions to dismiss on April 21, 1983, and, on May 6, 1983, BN filed its memorandum of law in opposition.

On April 25, 1983, in a case of first impression, the United States Court of Appeals for the Tenth Circuit held the railroads must prove "purposeful overvaluation [by state officials] with discriminatory intent" in order to obtain relief under Section 306 from discriminatory overvaluation of their property.<sup>1</sup> *Burlington Northern R. R. v. Lennen*, 715 F.2d 494, 498 (10th Cir. 1983). On August 30, 1983, this Court directed the parties to file briefs addressing the effect of *Burlington Northern R. R. v. Lennen* upon this litigation. BN and the Commission filed such briefs on September 14, 1983.

On October 13, 1983, BN sought leave to amend its complaint to include the requisite allegations of intent. This Court granted leave to amend on November 3, 1983, and, on November 9, 1983, BN amended its complaint to allege that the defendants had purposefully overvalued

<sup>1</sup> This evidentiary requirement originated with the Tenth Circuit; it is not set forth in the statutory language of Section 306. BN contends that the Tenth Circuit's decision to require proof of discriminatory intent in Section 306 cases is erroneous and has petitioned the United States Supreme Court for a writ of certiorari. The Supreme Court has issued an order requiring the Solicitor General of the United States to file a brief on the question of whether *Burlington Northern R. R. v. Lennen* was correctly decided and expressing the views of the United States on the issues raised by the petition. The Solicitor General has not yet filed his brief.

BN's property for the 1982 assessment year with discriminatory intent.

On November 17, 1983, counsel for the Commission requested a meeting in chambers among counsel and the Court to discuss, *inter alia*, the status of the Commission's 12(b)(1) motion to dismiss. Counsel for the Commission asserted that it was entitled to a ruling on this motion because, in the Commission's view, no facts exist which would tend to show purposeful overvaluation of BN's property with discriminatory intent for the 1982 assessment year. Counsel for BN disagreed and contended that: (1) the facts demonstrate a clear case of intentional overvaluation; (ii) BN should be permitted to proceed with discovery; and (iii) because the issue of discriminatory intent is inextricably interwoven with the merits of the case, final resolution of the jurisdictional question should be postponed until the trial on the merits. By Minute Entry dated November 17, 1983, this Court: (i) fixed a schedule for the completion of discovery; (ii) directed BN to submit a statement setting forth facts which, in BN's view, establish jurisdiction in this case under the standard of *Burlington Northern R. R. v. Lennen*, and (iii) directed the Commission to file a response.

On February 24, 1984, counsel for BN requested a telephone conference among all counsel and the Court to discuss the procedure that will govern the resolution of the Commission's 12(b)(1) motion to dismiss.<sup>2</sup> Counsel for BN contended that the Commission's 12(b)(1) motion should, at this stage of the proceedings, be treated as a motion for summary judgment and be governed by Rule 56. Counsel for the Commission contended other-

<sup>2</sup> Counsel for BN and the Commission are agreed that the Commission's 12(b)(6) motion to dismiss for failure to state a claim must be treated as a motion for summary judgment if matters outside the pleadings, such as the Commission's affidavits, are considered by the Court.



wise. This Court further directed the parties to brief the issue of procedure.

This memorandum of law and statement of facts is, therefore, submitted by BN in compliance with this Court's directives of November 17, 1983, and February 24, 1984.

#### PROCEDURE GOVERNING THE COMMISSION'S MOTION TO DISMISS UNDER RULE 12(b)(1)

At this stage of the proceedings, the Commission's 12(b)(1) motion should be treated as a motion for summary judgment and be governed by the standards of Rule 56. The only question before the Court should be: do the pleadings, depositions, answers to interrogatories and affidavits on file raise a genuine issue of material fact with regard to the Commission's intent in assessing BN's property for the 1982 assessment year?

A 12(b)(1) motion to dismiss may attack a complaint for failure to allege the requisite jurisdictional facts, or it may attack plaintiff's ability to prove factually that jurisdiction exists as alleged in the complaint. *See Wright & Miller, Federal Practice & Procedure: Civil*, § 1350, p. 549 (1969). The Commission's 12(b)(1) motion in this case is of the latter type; the Commission questions BN's ability to prove that the Commission purposefully overvalued BN's property with discriminatory intent for the 1982 assessment year.

Many of the facts bearing on the jurisdictional issue in this case, e.g., facts regarding the assessment procedures actually utilized by the Commission and its staff in fixing BN's 1982 assessment, also bear on the merits of BN's Section 306 claim. In *Baker v. Hunn Roofing, Inc.*, 399 F.Supp. 628 (W.D. Okl. 1975), Chief Judge Daugherty outlined the procedure that should be followed where jurisdiction is challenged under 12(b)(1) and

where issues of fact exist which pertain to both the Court's jurisdiction and the merits of the plaintiff's claim. Judge Daugherty held that, under such circumstances, the trial court should (i) treat the 12(b)(1) motion as a motion for summary judgment, or (ii) reserve the question of jurisdiction for the trial on the merits.

In *Schramm v. Oakes*, 352 F.2d 143 (1965), the Tenth Circuit approved of this procedure and observed that the purpose of deferring final resolution of jurisdictional questions until trial (unless there are no genuine issues of material fact pertaining to jurisdiction) is "to prevent a summary disposition on the merits without the ordinary incidents of a trial. . . ." 352 F.2d at 149. Where jurisdiction is challenged under Rule 12(b)(1), plaintiffs must be afforded an opportunity to develop, present and argue the facts in a manner that is adequate in the context of the disputed issues in evidence. *Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L. Ed.2d 212 (1981).

Although federal district courts have broad discretion in resolving 12(b)(1) motions, both fairness and analogy to Rules 12(b)(6) and 56 require that the parties be given an opportunity to litigate their factual dispute; the courts must take evidence on factual issues pertaining to jurisdiction if the parties' affidavits do not suffice to eliminate all genuine issues of material fact. *Gordon v. National Youth Work Alliance*, 675 F.2d 356, 360 (D.C. Cir. 1982); *Mortensen v. First Federal Savings & Loan Association*, 549 F.2d 884, 891 (3rd Cir. 1977). *See also, Budde v. Ling-Temco-Vought, Inc.*, 511 F.2d 1033 (10th Cir. 1975 (where defendant moves to dismiss for lack of personal jurisdiction, both parties should be allowed discovery on factual issues raised by the motion)).

BN submits the following memorandum and statement of facts for the purpose of showing that genuine issues of material fact exist with respect to the question of dis-



criminatory intent and that the Commission's 12(b) (1) motion should be denied.<sup>3</sup>

ARGUMENT AND FACTS IN OPPOSITION TO  
THE COMMISSION'S MOTION TO DISMISS  
UNDER RULE 12(b) (1)

A. Methods Of Proving "Purposeful Overvaluation With Discriminatory Intent."

In *Burlington Northern R. R. v. Lennen*, 715 F.2d 494 (10th Cir. 1983), the court of appeals held that a railroad seeking relief under Section 306 from discriminatory overvaluation of its property by state officials must "make a strong showing of purposeful overvaluation of [its] property with discriminatory intent. . . ." 715 F.2d at 498. The court of appeals did not, however, trace the legal antecedents of this evidentiary requirement or discuss the means by which "purposeful overvaluation with discriminatory intent" might be proven.

Prior to the effective date of Section 306, railroads frequently sought relief in federal court from discriminatory state ad valorem taxation under the equal protection clause of the fourteenth amendment to the United States Constitution. See, e.g., *Great Northern Ry v. Weeks*, 297 U.S. 135, 56 S. Ct. 426, 80 L. Ed. 532 (1936); *Rowley v. Chicago & N.W. Ry.*, 293 U.S. 102, 55 S. Ct. 55, 79 L. Ed. 222 (1934); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 430 (1923); *Chicago, Burlington & Quincy Ry. v. Babcock*, 204 U.S. 585, 27 S. Ct. 326, 51 L. Ed. 636 (1907); *Coulter v. Louisville & Nashville R. R.*, 196 U.S. 599, 25 S. Ct. 342, 49 L. Ed. 615 (1905); *Louisville & Nashville R. R. v. Public Serv-*

<sup>3</sup> This memorandum should not be construed as a request by BN for findings of jurisdictional facts by this Court or as a submission by BN of its case on brief. If this Court intends to decide the jurisdictional facts, BN respectfully requests an evidentiary hearing at which it will have an opportunity to make a complete record and at which this Court will decide the factual issues by a preponderance of the evidence.

*ice Commission*, 493 F. Supp. 162 (M.D. Tenn. 1978), *aff'd*, 631 F.2d 426 (6th Cir. 1979); *Louisville & Nashville R. R. v. Public Service Commission*, 249 F. Supp. 894 (M.D. Tenn. 1966), *aff'd* 389 F.2d 247 (6th Cir. 1968).

These fourteenth amendment cases involve ad valorem tax discrimination arising from a variety of sources, e.g., discrimination caused by the overvaluation of railroad property (*Great Northern Ry.*, *supra*, *Rowley*, *supra*, and *Sioux City Bridge Co.*, *supra*), by the undervaluation of non-railroad property (*Louisville & Nashville R. R.* cases) or by a combination of both factors (*Chicago, Burlington & Quincy Ry.*, *supra*, and *Coulter*, *supra*). In each of these cases, the court required the complaining railroad to prove that the tax discrimination at issue, regardless of its source, was "purposeful," or "systematic and intentional." As stated in *Southland Mall, Inc. v. Garner*, 455 F.2d 887, 889 (6th Cir. 1972):

The element which [a taxpayer] must always prove [in order to establish an equal protection violation] is that he has been a victim of "intentional and arbitrary discrimination whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352, 38 S. Ct. 459, 62 L. Ed. 1154 (1918);

. . . .

In explaining the intention which must be shown, the Supreme Court has stated: "There must be something that amounts to an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principle of uniformity." *Rowley v. Chicago & Northwest Railway*, 293 U.S. 102, 111, 55 S. Ct. 55, 59, 79 L. Ed. 222 (1934).

. . . .

While taxpayers have normally prevailed on equal protection claims only when they were able to demonstrate a systematic pattern of discrimination . . .

such a systematic pattern does not appear to be an essential element of the claim. See *Snowden v. Hughes*, 321 U.S. 1, 9-10, 64 S. Ct. 397, 88 L. Ed. 497 (1944). Thus clear proof that a tax was discriminatorily aimed at a single taxpayer has been held to support an equal protection claim. *McFarland v. American Sugar Company*, 241 U.S. 79, 36 S. Ct. 498, 60 L. Ed. 899 (1916).

The evidentiary requirement of "intentional discrimination" in federal equal protection cases is, by its terms, indistinguishable from the evidentiary requirement of "purposeful overvaluation with discriminatory intent" as defined in *Burlington Northern R. R. v. Lennen*.<sup>4</sup> Thus, federal equal protection decisions which address issues of state tax discrimination and which antedate the passage of Section 306 offer some guidance as to how discriminatory intent may be proven under the *Burlington Northern R. R. v. Lennen* standard.

Certain general principles are apparent from a review of federal fourteenth amendment cases attacking the validity of state tax assessments:

First, purposeful, or systematic and intentional, discrimination may be proven by direct evidence or inferred from circumstantial evidence. As stated in *Southland Mall, Inc., supra*:

Assuming, as we must, that public officials rarely admit wrong doing we must accept circumstantial evidence of improper intention.

455 F.2d at 891.

<sup>4</sup> In *Burlington Northern R. R. v. Lennen, supra*, and in *Atchison, Topeka & Santa Fe Ry. v. Lennen*, 640 F.2d 255 (10th Cir. 1981), the Tenth Circuit acknowledged that Section 306 is remedial legislation. 715 F.2d at 496-97; 640 F.2d at 259. In view of this acknowledgment, it cannot be argued that the Tenth Circuit, by requiring proof of discriminatory intent in Section 306 valuation cases, intended to impose any greater evidentiary burden upon railroads than railroads would have to bear in the absence of Section 306.

Second, although mere "errors of judgment" resulting in overvaluation do not, standing alone, support a claim of purposeful discrimination, *Rowley v. Chicago & N. W. Ry.*, 293 U.S. at 111; *Soiux City Bridge Co. v. Dakota County*, 260 U.S. 447; *Chicago, Burlington & Quincy Ry. v. Babcock*, 204 U.S. at 598; *Southland Mall, Inc. v. Garner*, 455 F.2d 889, a failure to use proper valuation methods, or a persistent disregard on the part of state officials for known conditions essential to a just determination of value, constitute strong circumstantial evidence of intentional discrimination. *Great Northern Ry. v. Weeks*, 197 U.S. at 151; *Cumberland Coal Co. v. Board of Revision of Tax Assessment*, 284 U.S. 23, 52 S. Ct. 48, 76 L. Ed. 146 (1931); *Bailey v. Megan*, 102 F.2d 651 (8th Cir. 1939).

In *Great Northern Ry., supra*, the Supreme Court inferred purposeful discrimination from the fact that state taxing authorities disregarded changed business conditions which substantially affected the railroads' value, e.g., substantial declines in traffic and revenue and increased competition for new methods of transportation. In *Cumberland Coal Co., supra*, the United States Supreme Court held that intentional discrimination could be inferred where county assessors assessed all coal lands in the county at the same valuation and ignored differences in the assessability, transportability and value of various types of coal subject to assessment. In *Bailey, supra*, the Eighth Circuit inferred discriminatory intent primarily from the fact that state taxing authorities had refused to lower railroad values significantly despite a substantial downward trend in the income indicators of value that the state had historically used to estimate value.

Third, differences in valuation methodology among taxpayers of the same class, or recent alterations in valuation methodology which substantially affect the resulting value, also indicate purposeful discrimination. For example, in *Raymond v. Chicago Union Traction Co.*, 207



U.S. 20, 28 S. Ct. 7, 52 L. Ed. 78 (1907), the court inferred discriminatory intent from the fact that county officials had assessed railroad property at a different rate, and by a different method, from that which had been employed by those officials for other corporations of the same class for the same year. In *Burlington Northern R. R. v. Lennen*, the Tenth Circuit relied upon the absence of any changes in the procedures utilized by the state to value railroad property as an indication that the state had not intentionally discriminated against the railroads in that case. 715 F.2d at 498.

Fourth, and perhaps most significant for purposes of this case, an historical pattern of systematic and intentional discrimination against a particular taxpayer, or class of taxpayers, raises the inference that state officials intended to practice the same sort of discrimination for the tax year in question. See, e.g., *Louisville & Nashville R.R. v. Public Service Comm.*, 249 F.Supp. 894, 902 (M.D. Tenn. 1966).

These principles of proof are identical to those employed by federal courts in racial discrimination cases under the fifth and fourteenth amendment amendments to the United States Constitution, and in actions under Title VII of the Civil Rights Act of 1964, alleging disparate racial treatment. These cases (like Section 306 valuation cases as interpreted by the Tenth Circuit) require proof of discriminatory intention. Discussing the methods by which a racially discriminatory purpose might be proven, the United States Supreme Court stated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L.Ed. 2d 450 (1977):

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of

the official action—whether it “bears more heavily on one race than another,” . . .—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . . The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125 (1960) or *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064 (1886), impact alone is not determinative, and the Court must look to other evidence.

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. . . . The specific sequence of events leading up [sic] the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

429 U.S. at 266-68; 97 S. Ct. at 564-65 [footnotes omitted].

In *Columbus Board of Education v. Penick*, 443 U.S. 449, 464-65, 99 S. Ct. 2941, 2950, 61 L.Ed.2d 666, 680-681 (1979), the Supreme Court held that adherence to a specific policy or practice with full knowledge of the predictable effect raises an inference of intent. Finally, in *Washington v. Davis*, 426 U.S. 229, 241, 96 S. Ct. 2040, 2048, 48 L.Ed.2d 597, 608 (1976), the Supreme Court observed that, particularly where government action is involved, the most probative evidence of intent is



objective evidence of what actually occurred.<sup>5</sup> See also, *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 247 (10th Cir. 1970), *cert. denied*, 401 U.S. 954, 91 S. Ct. 972, 28 L. Ed.2d 237 (1971).

Applying such principles of proof to this case, BN contends that this Court may infer "purposeful overvaluation with discriminatory intent" from the following facts and that summary judgment is, therefore, improper.

B. Facts Of This Case Which Demonstrate "Purposeful Overvaluation With Discriminatory Intent"

1. An Overview Of The Facts

The Commission has practiced systematic and intentional tax discrimination against railroads for many years. Historically, the Commission has disregarded the fundamental principle of uniformity in taxation, has failed to use proper valuation methods, and has ignored known conditions essential to a just determination of value. The Commission has been result-oriented, i.e., the Commission's principal concern has been to maintain aggregate assessments of railroad (and other public utility) property at a high level relative to those of locally-assessed property irrespective of the true market value of railroad property, and with full knowledge of wide disparities in assessment levels among railroads and between railroads and other taxpayers.

For the 1982 assessment year, the Commission once more assessed railroad property without regard for

<sup>5</sup> As in fourteenth amendment tax cases, evidence of open statements by the defendant of an intent to discriminate is not necessary to prove a civil rights violation. *Denney v. Hutchinson Sales Corp.*, 649 F.2d 816, 822 (10th Cir. 1981). Similarly, mere protestations of a lack of discriminatory intent, or affirmations of good faith, will not suffice to rebut a *prima facie* case of discrimination. *Castaneda v. Partida*, 430 U.S. 482, 499 n.19, 97 S. Ct. 1272, 1282, 51 L. Ed.2d 498 (1977).

proper valuation methodology or for known conditions essential to a just determination of value. Prior to 1982, the Commission had made no attempt whatsoever to assess all railroads at the same percentage of true market value, or to assess all railroads at the same percentage of true market value as other property. In 1982 the Commission decided to comply with Section 306 and to assess railroad property at the assessment percentage applicable to "all other commercial and industrial property." However, the Commission's principal objective in 1982, as in prior years, was to maintain aggregate railroad assessments at or near the prior year's level.

Although the Commission applied the commercial and industrial assessment percentage to all railroads in 1982, it concurrently, and substantially, altered the valuation methodology which had purportedly formed the basis for its assessments of railroad property in 1979, 1980 and 1981. By altering valuation methodology, the Commission achieved substantially higher values than those that had formed the basis of its assessments for 1981 (70% higher in the case of BN). By manipulating railroad values, the Commission achieved aggregate railroad assessments for 1982 only slightly lower than those for 1981. By manipulating BN's 1982 value, the Commission achieved a 1982 assessment for BN which was: (i) only slightly lower than the Commission's assessment for BN for 1981, and (ii) significantly higher than BN's 1982 assessment would have been if the Commission had applied Section 306 as it is written, i.e., if the Commission had determined the true market value of BN's property in Oklahoma and applied the commercial and industrial assessment percentage of 10.87%. In short, the Commission was unwilling to appraise railroad property at true market value, assess it at the commercial and industrial percentage, and let the chips fall where they may. The Commission was as result-oriented in 1982 as it had been in past years.

## 2. Specific Facts Which Demonstrate Discriminatory Intent \*

### a. Assessment Years 1967 to 1973

For the assessment years 1967 through 1973, the Commission's assessments of railroad property were not based upon true market value. During this period, the Director of the Ad Valorem Tax Division of the Commission ("Director"), Mr. J. L. Merrill, made no "zero-based" appraisals of railroad property, i.e., he made no attempt to determine the true market value of each railroad's property as of the assessment date. The Director arrived at a proposed assessment for a particular railroad merely by adjusting the previous years' assessment upward (for such additions and betterments as had occurred during the calendar year prior to the assessment date) and downward (for such retirements as had occurred during the same calendar year). Merrill Dep., 14:15-17; 15:7-14; 36:1-7.

During this period, the Director routinely held informal conferences with railroad tax managers prior to recommending an assessment to the Commission. As a result of such conferences (at which the railroad tax managers usually expressed their opinion as to the correct value of, and methods of valuing, railroad property) the Director would occasionally "adjust" his proposed assessment. *Ibid.*, 14:10-16; 16:21-24; 17-19:1-3.

The Director recognized that, during the period 1967 to 1973, railroad values were declining as a result of economic conditions, and that assessments of railroad property were probably too high relative to those imposed on other property. *Ibid.*, 20:16-25; 21-22:1-12.

\* Citations to depositions indicate the deponent, page number, and beginning and ending lines. For example, a reference to page 14, lines 14 through 22 of the deposition of J. L. Merrill is cited at "Merrill Dep., 14:14-22."

Although the Director established a deliberate policy of lowering aggregate railroad assessments slightly each year, he did so without any knowledge of the true market value of any particular railroad's property; his assessment for a particular railroad remained an "extrapolation" of the prior year's assessment. *Ibid.*, 18:18-24; 21:18-13; 31; 32; 33.

During this period, neither the Director nor the Commission made any attempt to apply a uniform assessment ratio to railroad property; they failed to do so even though Commission conducted annual ratio studies by which the prevailing level of assessment among non-utility properties could have been easily computed. *Ibid.*, 22; 61.

The Director occasionally monitored "assessment ratios" for each railroad; however, because the Director had never seriously attempted to ascertain the true market value of any railroad, these "assessment ratios" were not assessment ratios in the true sense, i.e., they were *not* ratios of assessed value to true market value. The Director's "assessment ratio" for each railroad was nothing more than the number derived by dividing a particular railroad's assessment (which had been adjusted or negotiated in conference) by its "value" (which was based upon book adjustments to the previous year's assessment). *Ibid.*, 22; 23:24-25.

### b. Assessment Years 1973 Through 1978

In February, 1973, Mr. Merrill was appointed to the Commission to serve as its Secretary-Member (a position which he holds at present). His successor as Director was Mr. Louis H. Bohr. Mr. Merrill trained Mr. Bohr for the position of Director, guided Mr. Bohr through the assessment process for the 1973 assessment year, and closely supervised his performance for a short time thereafter. *Ibid.*, 25-27.



Mr. Bohr inherited both the railroad assessment numbers and the assessment technique of his predecessor, i.e., Mr. Bohr's railroad assessments were based primarily upon the prior year's assessment as adjusted for such additions and betterments as had occurred during the preceding year. As a consequence, Mr. Bohr's assessments, like those of his predecessor, bore no particular relationship to true market value. *Ibid.*, p. 26.

Like his predecessor, Mr. Bohr also held informal conferences with individual railroad tax managers prior to submitting his recommended assessments to the Commission. At these conferences, Mr. Bohr and the railroad tax manager would review an assessment worksheet that Mr. Bohr had prepared beforehand setting out, *inter alia*: (i) the railroad's assessment for the previous assessment year; (ii) the railroad's total additions and betterments for the previous calendar year; and (iii) the railroad's total net investment as shown on its books of account (i.e., the railroad's net book cost). Mr. Bohr, like his predecessor, occasionally "adjusted" his proposed assessment during conference. The amount of the adjustment was usually memorialized on the railroad's worksheet. Wehner Affidavit, filer March 1, 1984, Ex. 1.

In 1977, Mr. Bohr began to compute an income indicator of value for each railroad that he assessed and to depict this computation on his assessment worksheet. According to one of Mr. Bohr's principal assistants, Mr. David Taylor, Mr. Bohr's objective in computing an income indicator was to begin the process of bringing Oklahoma's railroad assessments into compliance with Section 306. In Mr. Taylor's words, Mr. Bohr believed the Section 306 required Oklahoma to: (i) make "more reasonable appraisal[s]" of railroad property than had been made in the past, and (ii) apply a lower assessment percentage to railroad valuations than had been applied in Oklahoma, 17:15-25.

Mr. Bohr did not, however, place principal reliance upon the income indicator of value. His apparent intention was to "phase-in" his income indicator by giving it only 10% weight relative to his net book cost indicator for 1977 and 1978 and to gradually increase the weight placed upon capitalized income in future years. According to Mr. Taylor, Mr. Bohr's decision to phase-in an income indicator over a period of years was influenced by the revenue requirements of the counties. Mr. Bohr believed that the counties simply could not afford the reduction in railroad tax revenue that would result if railroads were assessed suddenly—and primarily—on the basis of capitalized income. *Ibid.*, 21:20-25; 22:1-21; 30:10-14; Bohr, 14; 64:23-25; 88:16-22.

#### c. Assessment Years 1979 Through 1981

At informal conferences with BN's railroad tax manager for each of the assessment years 1979 through 1981, Mr. Bohr represented that he had determined his assessment for BN [and the assessment of BN's predecessor company, The St. Louis and San Francisco Railway Company ("Frisco")] by the following procedure: (i) Mr. Bohr first estimated a full system value for the railroad by deducting from net book cost an amount attributable to functional and economic obsolescence;<sup>7</sup> (ii) Mr. Bohr next allocated a percentage of this full system value to the State of Oklahoma; and (iii) Mr. Bohr then assessed this allocated value by a specific assessment percentage (23.5% in 1979, 21.75% in 1980, and 19% in 1981). These data and computations were memorialized by Mr. Bohr in writing, with copies furnished to BN's tax manager, Mr. T. C. Wehner, Wehner Affidavit filed March 1, 1984, Exs. 5, 6, 7.

<sup>7</sup> Mr. Bohr granted Frisco obsolescence of 40% of net book cost for 1979 and 45% of net book cost for 1980; he granted BN obsolescence of 50% of net book cost for 1981. Wehner Affidavit filed March 1, 1984, Exs. 5, 6, 7.



During one or more of these conferences, Mr. Bohr admitted that Oklahoma's railroad assessments were higher than they should be. Mr. Bohr also stated that, while he could not reduce railroad assessments to the proper level all in one year, his objective was ultimately to reduce railroad assessments to a "more reasonable" level and to bring them into conformity with the requirements of Section 306. *Ibid.*, ¶ 8.

After Mr. Bohr had completed his informal conferences with railroad tax representatives and had made whatever adjustments to railroad assessments that he saw fit, he presented his recommended assessments to the Commission for approval. Mr. Bohr's recommendations were set forth on documents which showed: (i) the current year's recommended assessment for each railroad; (ii) the prior year's assessments for each railroad; (iii) aggregate assessments of railroads and airlines as a class for the current year and for the prior year; and (iv) the net gain or loss in aggregate assessments from the prior year. See, e.g., Transmittal Letter of April 24, 1981, from the Commissioner to the State Board (Appendix H to the Commissioner's Brief in Support of its Motion to Dismiss filed April 21, 1983).

In presenting his proposed assessments of railroad property to the Commission, Mr. Bohr did not furnish the Commission with any supporting documentation; the Commission did not, as a routine matter, review any of Mr. Bohr's assessment worksheets, conference memoranda, or valuation data. The Commission routinely accepted Mr. Bohr's proposed assessments and forwarded them to the State Board as the Commission's recommendation. Merrill, 37-41.

For each railroad that he assessed, Mr. Bohr prepared a document entitled "Oklahoma Compliance, Railroad Revitalization and Regulatory Reform Act of 1976." These documents, which were compiled by members of Mr. Bohr's

staff for each assessment year since 1975, showed the following information for each railroad: (i) Mr. Bohr's net book cost and income indicators of value; (ii) Mr. Bohr's estimate of the railroad's full system value; (iii) the Oklahoma allocation percentage; (iv) the railroad's allocated Oklahoma value; (v) the railroad's assessment; and (vi) the railroad's "ratio." Mr. Bohr usually furnished copies of Frisco's (or BN's) compliance sheet to BN's tax manager. Although Mr. Bohr also maintained copies of these "compliance sheets" in Commission files, the Commission did not examine them in deciding whether to accept Mr. Bohr's recommended assessments. Wehner Affidavit filed March 1, 1984, Exs. 8, 9, 10, 11; Merrill, 54-56.

The "compliance sheets" that Mr. Bohr furnished BN's tax manager differ slightly from the "compliance sheets" contained in the Commission's files. (Compare entries on the line for 1981, Wehner Affidavit filed March 1, 1984, Ex. 10, with entries on the line for 1981, Merrill Affidavit, Ex. K. to the Commission's Brief in Support of its Motion to Dismiss filed April 21, 1983). Furthermore, Mr. Bohr's "compliance sheets" show multiple, and widely disparate, entries for many of the same items. For example, the "compliance sheet" attached to Merrill Affidavit, Ex. K., shows multiple "system values" for BN for 1979, multiple "Oklahoma values" for BN for 1979 and 1981, and multiple "ratios" for 1979 and 1981.

These documents suggest that, notwithstanding his representations in conference to BN's tax manager, Mr. Bohr was (as late as 1981) assessing railroad property on the basis of what he perceived to be an "acceptable" or "reasonable" assessment, rather than on the basis of bona fide estimates of true market value. Indeed, Mr. Bohr admitted on deposition in this case that, in making his assessments of railroad property, he was not particularly concerned with valuation methodology or with applying the correct assessment percentage. Bohr, 31:17-24; 33:4-5. Mr. Bohr's principal concern, by his own ad-

mission, was merely to arrive at an assessment which would generate sufficient revenue and be acceptable to the railroad taxpayer. Bohr, 64:5-6; 88:16-22. In short, Mr. Bohr worked the assessment process in reverse. He first determined what would be an acceptable assessment for a particular railroad in a given year; he then adjusted his "indicators of value" in conference with railroad tax managers and mollified the managers with assurances of further reductions.

#### d. The 1982 Assessment Year

Two new Commissioners assumed office in late 1981. Mr. Odie Nance was appointed to the Commission as Chairman and Mr. Robert Wadley was appointed as the third member. Nance, 3:20-25; 4:1-19; Wadley, 3:22-25; 4:1-11.

These gentlemen were apparently dissatisfied with Mr. Bohr's performance as Director and objected to his practice of conferring informally with railroad tax representatives (even though this procedure had been followed for over fifteen years). The Commission directed Mr. Bohr to discontinue informal tax conferences for the 1982 assessment year and, in late March 1983, directed him generally to assess railroad property for the 1982 assessment year in a "uniform and consistent manner." Nance, 28:17-25; 25-30:1-17.

At about the same time, Mr. Merrill requested Mr. Bohr to furnish the Commission with information concerning the relative levels of assessment of each of the fifteen railroads operating within Oklahoma. The purpose of this request was to determine the degree of variation among railroad assessments. Merrill, 46-46

Mr. Bohr furnished the Commission with a document entitled "Railroads," which showed the assessment, the 1981 Oklahoma fair cash value, and the assessment "ratio" for each railroad in the State for 1981. The as-

essment "ratios" depicted on this document varied widely, ranging from a low of 8.25% to a high of 19.75%.<sup>8</sup> See Merrill Affidavit, Ex. J to Commission's Brief in Support of its Motion to Dismiss filed April 21, 1983.

Also in March, 1983, the Commission decided to comply for the first time with the requirement of Section 306 that a railroad property be assessed at the same assessment percentage applicable to "all other commercial and industrial property." Although the Commission had conducted ratio studies annually for many years prior to 1982 and was aware of the average level of assessment of commercial and industrial property in the state, the Commission had never before used the commercial and industrial assessment percentage in determining railroad assessments. Merrill, 49:61-63.

The Commission was, however, concerned with the effect which its decision to use the commercial and industrial assessment would have on aggregate railroad assessments. Before deciding upon the assessment ratio that it would apply to railroads for the 1982 assessment year, the Commission wanted to insure that aggregate railroad assessments for 1982 would not fall significantly

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<sup>8</sup> In truth, this document revealed absolutely nothing about the prevailing level of assessment of railroad property in Oklahoma, or about the relative levels of assessment among the railroads. Because Mr. Bohr's 1981 assessments were merely negotiated numbers which bore no particular relationship to true market value, the "ratios" shown on this document were not true assessment ratios, i.e., they did not reflect the actual percentage of *true market value* at which the railroad's property had been assessed. These "ratios" were computed ratios; they were derived merely by dividing Mr. Bohr's 1981 assessment (after adjustment in conference) by his *unadjusted* 1981 "value" allocated to the State of Oklahoma. Furthermore, the 1981 "ratio" depicted on this document for BN (10.99%) is far different from the assessment percentage (19%) that, according to Mr. Bohr's statements to Mr. Wehner, had been used in 1981 to compute BN's assessment. Compare Wehner Affidavit, Ex. 7, with the "Railroads" document.



below 1981 levels. In March or April of 1982, the Commission asked its Economic Research Section "to devise a range of ratios" for railroads and public service companies for the 1982 assessment year that "would be such as to *not* cause a decrease in total assessed value for the assessment year 1981." [Emphasis added]. Memorandum of Reece Womack, April 23, 1982, Ex. A to Commission's Brief in Support of its Motion to Dismiss filed April 21, 1983. The Commission also requested that its Economic Research Section develop a single ratio for railroads and public service companies "that would *not* result in a decrease in total 1981 assessed value." *Ibid.*

Before railroad assessments for the 1982 assessment year were finalized, Mr. Bohr was relieved as Director. Bohr, 42; 68. Since he had been directed by the Commission to hold no informal conferences with railroad tax representatives, Mr. Bohr made none of the substantial adjustments for obsolescence that he had made during each of the three previous assessment years. He submitted to the Commission only the unadjusted indicators of value set forth on his 1982 worksheets. The Commission, in turn, applied the assessment percentage applicable to commercial and industrial property (10.87%) to Mr. Bohr's *unadjusted* indicators of value. Wehner, Affidavit filed March 1, 1984, ¶ 11.

By failing and refusing to adjust, or reduce, Mr. Bohr's net book value indicator for obsolescence inherent in railroad assets (as Mr. Bohr had done historically), the Commission grossly overvalued BN's property for 1982.<sup>9</sup>

<sup>9</sup> BN contends that the true market value of its system property for the 1982 assessment year is \$1,495,253,000.00. The "full system value" which forms the basis of the Commission's 1982 assessment is \$3,574,921,544.00. For purposes of this litigation, the Commission has hired an outside appraiser, Mr. Michael W. Goodwin, who has estimated the full system value of BN for 1982 at \$3,400,000,000.00. Mr. Goodwin is the former Chief of the Public Service Appraisal Bureau, Division of Property Valuation, Kansas

By substantially altering the valuation methodology that (at least as represented by Mr. Bohr to BN's tax manager) had been used to estimate BN's full system value for 1979, 1980 and 1981, the Commission was able to give the appearance of complying with Section 306 and, at the same time, to fulfill its primary objective of maintaining aggregate railroad assessments at or near 1981 levels.<sup>10</sup>

## CONCLUSION

It should be emphasized that no Section 306 valuation case, including *Burlington Northern R. R. v. Lennen*, has been dismissed for want of subject matter jurisdiction. *Burlington Northern R. R. v. Lennen* is merely the denial of the railroad's application for a preliminary injunction; that decision did not preclude the railroads from proceeding to a trial on the merits under the *Lennen* standard. In *Missouri Pacific R. R. v. Mauer*, No. CI 82-C-1445 (1982), D.C. Colo.), a case which involves both valuation and equalization issues under Section 306, the district court denied the State's 12(b)(1) motion and reserved the question of subject matter jurisdiction until trial.

BN respectfully submits that the facts and inferences outlined in this memorandum raise a genuine issue of material fact regarding the intent of the Commission in

Department of Revenue. As such, Mr. Goodwin developed the indicators of value used by the Kansas Department of Revenue to assess BN for ad valorem tax purposes for 1981; Mr. Goodwin's 1981 investment indicator adjusted for obsolescence was \$1,898,367,327; his 1981 market indicator for BN was \$2,282,873,444; his highest 1981 capitalized income indicator for BN was \$1,905,342,506. BN submits that Mr. Goodwin's 1982 appraisal of BN, which fixes BN's value at nearly *twice* the value which he himself estimated in 1981, is not credible. Goodwin, —.

<sup>10</sup> The Commission's recommended assessments of railroad property for 1981 totalled \$58,821,138. The Commission's recommended assessments of railroad property for 1982 totalled \$57,134,234. Exhibits B and J, Commission's Brief In Support of its Motion to Dismiss filed April 21, 1983.



valuing BN's property for the 1982 assessment year. The Commission's 12(b)(1) and 12(b)(6) motions to dismiss should be, therefore, be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-83-419-R

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*  
vs.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIRMAN  
OF THE OKLAHOMA TAX COMMISSION; ROBERT T.  
WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX  
COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF  
THE OKLAHOMA TAX COMMISSION; STATE BOARD OF  
EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE  
NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZA-  
TION OF THE STATE OF OKLAHOMA; SPENCER BERNARD;  
LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE  
FISHER; and MIKE TURPEN, MEMBERS OF THE STATE  
BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,  
*Defendants.*

**RESPONSE OF DEFENDANTS TO PLAINTIFF'S  
SUPPLEMENTARY BRIEF AND STATEMENT  
OF FACTS IN OPPOSITION TO THE MOTION TO  
DISMISS OF THE OKLAHOMA TAX COMMISSION**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

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CIV 83-419-R

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*

vs.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, CHAIRMAN  
OF THE OKLAHOMA TAX COMMISSION; ROBERT T.  
WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX  
COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF  
THE OKLAHOMA TAX COMMISSION; STATE BOARD OF  
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TION OF THE STATE OF OKLAHOMA; SPENCER BERNARD;  
LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE  
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*Defendants.*

---

RESPONSE OF DEFENDANTS TO PLAINTIFF'S  
SUPPLEMENTARY BRIEF AND STATEMENT OF  
FACTS IN OPPOSITION TO THE MOTION TO  
DISMISS OF THE OKLAHOMA TAX COMMISSION

---

Defendants, Oklahoma Tax Commission (OTC) and  
State Board of Equalization (State Board), submit to the  
Court the following response to Plaintiff's, Burlington  
Northern Railroad Company (BN), Supplementary Brief  
and Statement of Facts in Opposition to the Motion to  
Dismiss of the Oklahoma Tax Commission.

STATEMENT OF THE CASE

Burlington Northern filed its complaint herein on  
March 3, 1983, alleging overvaluation of BN's taxable  
Oklahoma property for the 1982 ad valorem tax assess-  
ment. BN alleged this overvaluation violated 49 U.S.C.  
§ 11503, also referred to as "Section 306" of the Rail-  
road Revitalization and Regulatory Reform Act of 1976,  
by a de facto assessment ratio which exceeded the permis-  
sible variance from that ratio used in assessing other  
commercial and industrial property in Oklahoma for ad  
valorem tax purposes.

BN *did not* contest the allocation factor whereby a  
portion of BN's entire railroad system was allocated to  
Oklahoma for ad valorem tax purposes.

BN *did not* contest the assessment ratio, 10.87%, de-  
termined to be the statewide average assessment ratio  
for assessing commercial and industrial property in 1981  
by the various county assessors in this State.

BN complains *solely* that the valuation or full market  
value put upon its taxable property as of January 1, 1982  
violates 49 U.S.C. § 11503.

OTC filed its Motion to Dismiss on March 25, 1983,  
pursuant to Rule 12(b)(1) of the Federal Rules of Civil  
Procedure, asserting lack of subject matter jurisdiction  
of the federal district courts, under 49 U.S.C. § 11503  
and 28 U.S.C. § 1341, to hear pure valuation or de facto  
assessment controversies arising out of the administra-  
tion of state or local taxes.

The OTC further asserted, in the alternative, that the  
complaint failed to state a claim upon which relief could  
be granted, pursuant to Rule 12(b)(6) of the Federal  
Rules of Civil Procedure.

The OTC admits that there exists a valuation contro-  
versy between the parties. However, the OTC presses its  
Motion to Dismiss for lack of subject matter jurisdiction



under Rule 12(b)(1), *supra*; Plaintiff presents no cognizable dispute.

On April 21, 1983, the OTC filed its Response to the Complaint, Appendices to Response and Brief in Support of its Motion to Dismiss. The Response and Appendices provide detailed explanation of the assessment process utilized in Oklahoma for 1982, with records of the official acts of defendants, the State Officers enjoined with the duty to value and assess railroad company property for ad valorem tax purposes. That assessment process is undisputed.

The Brief in Support of OTC's Motion to Dismiss outlines the congressional history of 49 U.S.C. § 11503 demonstrating that Congress intended to provide a remedy for discrimination caused by the assessment ratio or the tax millage, and that Congress, in particular, *did not* intend to impress the status of supernumerary appraiser upon the federal district courts.

On August 25, 1983, while OTC's Motion to Dismiss was pending, the United States Court of Appeals for the Tenth Circuit upheld Judge Rogers' order in *Burlington Northern Railroad Company v. Lennen*, Case No. 82-1561 (D.C.Kan: Dec. 9, 1982), as to jurisdiction of valuation issues under § 11503, *supra*. Thereafter, BN amended its complaint herein, adding an allegation of purposeful overvaluation of BN's property with discriminatory intent.

The amended allegations did not raise new grounds or basis of claims as required by Rule 8 of the Federal Rules of Civil Procedure, but only included the conclusionary jurisdictional verbiage to bootstrap this case within the Tenth Circuit decision (*Burlington Northern Railroad Company v. Lennen*, 715 F.2d 494 (10th Cir. 1983)). At page 496 the Tenth Circuit ruled: "We emphasize, however, that a strong *prima facie* case of retaliation or intentional discrimination must be made."

The Amended Complaint and Complaint of BN yet base both jurisdiction and claimed relief upon the allegation that the "true and correct full system value of BN's property as of January 1, 1982 is \$1,495,253.00." Thus the Complaint, even though amended, raises only a pure valuation issue.

On September 14, 1983, parties briefed the impact of the *Lennen*, *supra*, decision as requested by the Court. OTC further directed the Court's attention to the recent Ninth Circuit decision in *ACF Industries, Inc. et al v. State of Arizona*, 714 F.2d 93 (9th Cir. 1983) decided August 26, 1983. ACF Industries challenged the methodology Arizona used to determine the assessment ratio, *not the valuation methodology*.

And, on November 17, 1983, the parties appeared before this Court, at which time Defendants renewed their Motion to Dismiss for lack of subject matter jurisdiction, Rule 12(b)(1). Upon Defendants' request, the Court ordered Plaintiff to lay its jurisdictional facts before the Court. Plaintiff requested the Court to defer ruling upon Defendants' Motion to Dismiss until trial on the merits. The Court set discovery schedule for the parties and ordered Plaintiff to file its statement of jurisdictional facts on or before January 31, 1984 and Defendants to file their response thereto on or before March 1, 1984. Further, in a telephone conference, the Court suggested briefs be filed as to the issue of subject matter jurisdiction and the procedure for pre-trial jurisdictional consideration and acquiesced in extensions of the time limits theretofore set.

### JURISDICTIONAL ISSUE

This matter presents only a factual dispute concerning the fair market value of BN's taxable Oklahoma properties as of January 1, 1982. The jurisdictional issue is, whether a pure valuation dispute, standing alone, vests

jurisdiction in this Court under 49 U.S.C. § 11503 and 28 U.S.C. § 1341.

### THE FAILURE OF PROOF

Before responding to Plaintiff's Supplementary Brief and Statement of Facts, this response will first discuss the failure of Plaintiff to establish facts in support of two crucial ultimate facts which Plaintiff asserts to convince this Court that the State of Oklahoma has purposefully overvalued its taxable property with discriminatory intent.

First, BN asserts that the valuation methodology utilized by the OTC in 1982 was substantially changed from the valuation methodology utilized in 1979, 1980 and 1981 to give the appearance of compliance with § 11503, *supra*. Second, BN asserts that the primary objective of the OTC in its valuation methodology was to maintain aggregate railroad assessments at or near the 1981 level.

In support of its first crucial ultimate fact, BN relies upon two self-serving affidavits of its employee, Thomas Wehner. Wehner's affidavits eschew and otherwise collaterally attack official actions for years prior to 1982, in an attempt to create a factual dispute as to the intent of the OTC in 1982.

In view of the whole record, these affidavits are nothing more than mere speculation as to the subjective intent of Lewis Bohr; inadmissible parole evidence attacking official documents. The 1981 value of BN was fixed by official action in 1981 and appears of record. Defendants strenuously object to BN's attack on *unchallenged*, prior official acts.

Wehner affies that the then Director of the Ad Valorem Tax Division of the Oklahoma Tax Commission, Mr. Lewis Bohr, *reduced* "his net book cost indicator" significantly by deducting from the net book cost an amount attributable to functional or economic obsolescence; and,

that Mr. Bohr, in his handwritten notes, Exhibits 5, 6 and 7 to Wehner's Affidavit filed March 1, 1984, *indicated* "estimate of full system values to be \$344,424,735.00, assessed at 23.5% in 1979, \$331,378,760.00 assessed at 21.75% in 1980 and \$2,107,321,000.00 assessed at 19% in 1981. Such testimony is mere opinion of another's opinion and not creditworthy.

At the crux of Mr. Wehner's affidavit is BN's approval of a valuation methodology based only upon the cost indicator, contrary to its ultimate goal in this lawsuit to force the State of Oklahoma, with the aid of this Court, to base its ad valorem tax valuation upon the net income at BN. This contradiction demonstrates the self-serving nature of the testimony and removes any possible credit from the testimony. Further, Wehner's affidavit, attempting to dignify Mr. Bohr's handwritten notes as a "valuation methodology" *does not* establish or even hint at the intent of the OTC to formulate radical change in the valuation methodology to compensate for the application of a single, uniform assessment percentage in 1982 of 10.87%. It speaks only to Mr Bohr's *indications*, not his acts as Ad Valorem Tax Division Director.

The prohibitions of § 11503 became effective in 1976, thus, according to Wehner's affidavit, BN certainly had a § 11503 lawsuit in 1979, 1980 and 1981 based upon those purported high assessment ratios. However, BN neither protested to the State Board nor litigated those numbers in any court in this State, even though under *Poulos v. State Board of Equalization*, 552 P.2d 1138 (1976) local assessments were equalized between 9% and 15%.

Wehner's affidavit is too weak to support the sweeping ultimate facts asserted by plaintiff. The official records and the testimony given at deposition of Mr. Borr, Ray Taylor, Odie A. Nance and J. L. Merrill are of greater dignity and absolutely refute Mr. Wehner's speculations.

Mr. Bohr testified that he prepared his handwritten notes, during conferences with the tax representatives of



the various companies who came in for a conference, to memorialize their suggestions and to give the tax representatives notes to take back to the company management (Bohr Deposition 41: 19-21, 50:25, 51:1-7, 67:16-22); that, as Division Director, he had no intention of using the handwritten notes as the official valuation methodology (Ibid. 52:1-2); and, that, the formula set out on the worksheets were the official valuation methodology (Ibid. 39:13-19, 49:9-21).

As to the "significant change" in the 1982 valuation methodology, Mr. Bohr testified on direct examination:

"Q. The question is: What number is that 10.87 to be applied to?

A. I think once the Oklahoma factor, which in '81 was 3.75, you have come up with an Oklahoma portion of that system value of a hundred thirty-six million. All right. When you use the same application and the same computation other than you change the weighting factor on income from twenty-five to forty, and, of course, the cost goes to the sixty percent from seventy-five, plus you change the Cap. rate from what, eleven to fourteen percent, *and you come up with an identical methodology of computation of system value*, and that in the case of 1982 is a hundred and twenty-six million. *So, we haven't increased what we consider to be your Oklahoma proportion of the value at all. We are reducing it. We are reducing the assessment, and I can't understand what you want from the Tax Commission and from certainly, those of us in the Ad Valorem Division who have worked and tried all through the years to be helpful to you and do everything we can to you to help with your assessment and your final assessed value.*" (Ibid. 40: 2-21) (Emphasis added.)

Oklahoma did change its 1982 valuation methodology from that used in 1981, as it had for several years.

These change were put into place by Mr. Bohr, as explained in the affidavit of David Ray Taylor, Exhibit I, Appendices to Response of Defendant:

"b. Beginning in 1976 the formula for valuation of Oklahoma fair cash value of railroads was changed to include two factors: original cost depreciated and capitalized income. The following formulas were utilized for the year indicated:

Year	Weight Assigned to Original Cost Depreciated	Capitalization Rate	Weight Assigned to Capitalized Income
1976	90%	8.50%	10%
1977	90%	8.50%	10%
1978	80%	9.50%	20%
1979	80%	10.00%	20%
1980	75%	10.50%	25%
1981	75%	11.00%	25%
1982	60%	14.00%	40%."

As to the intent of the Commissioners in directing the uniform application of the 60/40 valuation methodology for 1982 values and the uniform application of the 1982 assessment percentage of 10.87%, the Commissioners testified:

Chairman:

"Q. Did you in any way attempt to define the permissible assessment ratio in terms of whether it would produce an increase or decrease in total railroad assessments?

"A. Well, once again, you can look at what the results turns out to be, and, of course, you have records that shows what it has been historically, *but if the intent of your question is whether we were trying to get to some desired level or preconceived level, the answer is no.* It just had to come out the way it came out. Once you get the total list of fair cash values for all the railroads and you apply the



assessment ratio, you can only come up with one answer. It's not going to change. But, that doesn't keep you from seeing how it stacks up against the previous year, you know that information. But, there is no preconceived notion of where you want to get to. The system should not be approached that way. Our duty is to find out what the fair cash value of the property is, apply an appropriate assessment ratio, then our work is done. And, when I say applied, we recommend an assessment ratio, the Board of Equalization either adopts or rejects our recommendation." (Emphasis added.)

(Odie A. Nance Deposition, 96: 2-25)

Vice-Chairman

"Q. To whom did you defer on ad valorem tax matters?

"A. I didn't defer to anyone. I listened to the conversations that took place, if it sounded fair and even-handed, I could go along with it."

(Robert L. Wadley Deposition, 30: 24-25, 31: 1-3)

Secretary-Member

"Q. Did you make any computations or see any computations which would indicate what the effect of applying a 10.87 percent ratio across the board to all railroads would be?

...

"A. Not on tax revenue. That's not our function. That's all at the local level. The millage is established there and it can vary, partly with the people's choice as to bonds they might want to vote on and so on and so forth."

(J.L. Merrill Deposition, 83: 22-25, 84: 6-11)

The minutes of the State Board, filed herein by BN, the minutes of the OTC and the official communications

of the OTC to the State Board, each indicate that the OTC and the State Board were *only* concerned that the assessments were uniform and met the requirements of 49 U.S.C. § 11503, without regard to any increase or decrease in aggregate assessments. (Exhibit A, Appendices to Response of Defendants.) In fact, the memorandum from Reece Womack, Economist, to the Commissioners, dated April 23, 1982, part of Exhibit A, clearly states that a ratio of 11.32% is necessary to maintain the 1981 aggregate assessed value of railroad property, but 10.87% was used to assure compliance with § 11503, *supra*.

There is no evidence other than Wehner's affidavits to support Plaintiff's crucial ultimate facts that the 1982 valuation methodology was substantially changed or altered to give the appearance of compliance with § 11503, while the primary objective of the Commission in its 1982 valuation methodology was to maintain aggregate railroad assessments at the 1981 level.

Therefore, Defendants propose first and foremost that this Court find that Plaintiff has failed to prove by competent and creditworthy evidence a strong *prima facie* face of purposeful overvaluation with discriminatory intent, upon which this Court's jurisdiction may be based.

## STATEMENT OF FACTS

The OTC receives annual ad valorem tax reports from the various railroads having property in Oklahoma and makes findings and recommendations of valuation and assessments to the State Board (68 O.S. 1981, § 2454).

On April 25, 1982, the OTC laid its findings and recommendations for 1982 ad valorem tax assessment of BN's taxable property in Oklahoma as follows:

1982 Fair Cash Value:	\$126,194,733.00
1982 Assessment Ratio:	10.87%
1982 Recommended Assessed Value:	\$13,717,367.00
(Appendices to Response, Exhibit A)	

For 1981, BN self-assessed its Oklahoma taxable property at \$14,335,355.00 without specifying the valuation methodology or assessment percentage it used. (Bohr Deposition 55: 10-20, 56: 13-17.)

BN's net properties increased significantly from 1980 to 1982 occasioned by substantial capital expansion, per testimony of BN's Financial Officer:

"My question is, understanding that these were estimates of conversion, we see an approximate increase of \$300 million from 1980 to 1981, and again approximate increase of the estimate of gain about another \$300 million from '81 to '82. Is that a fair statement?

"A. Yes.

"Q. What, to your knowledge, would have occasioned the increase in these estimates?

"A. Well, because they pertain to successive years, and during each succeeding year we would have expended a very substantial amount of money on rail replacement, tie replacement, ballast replacement and the labor that went with it, and what you're looking at is the increment from the successive years capital program.

"Q. So assuming hypothetically that the Burlington Northern Railroad had been, as a matter of fact, operating underratable depreciation all along, the two-year increase to the capital account would have been in the vicinity of \$600 million, is that a fair statement?

"A. Yes. I think so, if I understand the question. Yes." (Emphasis added.)

(Garland Deposition, 48:14-52:6)

On May 19, 1982, the State Board assessed the BN as recommended by the OTC. (Appendices to Response, Exhibit B.)

For 1982 ad valorem tax purposes in Oklahoma, the taxable rail transportation property of BN was assessed at 10.87%, which is the same, exact statewide average assessment ratio applied to local assessed commercial and industrial property as determined from the most current completed study of levels of assessment as of April 25, 1982.

For 1982 ad valorem tax purposes in Oklahoma, the taxable rail transportation property of BN was valued by a determination of the full system unit value allocated to Oklahoma by using two indicators of value; original cost depreciated weighted 60% and three years weighted income capitalized at 14% and weighted 40%. (Appendices to Response, Exhibit M.)

For 1982 ad valorem tax purposes in Oklahoma, the taxable rail transportation property of all railroads within this state was valued by the same methodology as BN's property. (Appendices to Response, Exhibit J and Exhibit I to Deposition of Odie A. Nance.)

For 1981 ad valorem tax purposes in Oklahoma, the taxable rail transportation property of BN was valued by a determination of the full system unit value allocated to Oklahoma by using the two indicators of value used in 1982, cost and income, although the weightings and rates were different. (Appendices to Response, Exhibit K and Bohr Deposition 67:7-10.)

The above proposed facts are clarified and supported by the following historical overview and direction of the State of Oklahoma in its assessment process relating to ad valorem tax valuation of rail transportation properties.

#### A. HISTORICAL OVERVIEW OF RAILROAD VALUATION, PARTICULARLY OF THE BN/FRISCO SYSTEM SINCE 1965.

Most, if not all states, which are required to estimate a fair market value of railroads or public service corporations, currently employ a "unit method" of valuation,



and arrive at such unit valuation through "mass appraisal" techniques. Oklahoma has used a mass appraisal technique for the 1982 assessment year in question. Expert witnesses in valuation, such as Michael Goodwin on behalf of Defendants, or Arthur Schoenwald on behalf of Plaintiff, use a more detailed appraisal methodology commonly known as "fee appraisal".

The exact methodology Oklahoma used was a combination of the cost approach and the capitalized income approach, with a five-year weighted income analysis. In correlating these independent "value indicators" for 1982, Oklahoma gave a 60% weight to cost and a 40% weight to capitalized income. In arriving at the capitalized income stream, Oklahoma employed a so-called "capitalization rate" of 0.14 or 14%. There are no material disputes as to any evidentiary fact for the 1982 methodology. See Affidavit of David Ray Taylor, Exhibit "I" to Defendants' Response (Answer).

In its Statement of Facts, Plaintiffs track with more or less accuracy the fact that Oklahoma has over the years changed or evolved its evaluation methodology in order to arrive at the approach used in 1982, described above.

With particular respect to Burlington Northern Railroad Company and its predecessor-in-interest, St. Louis and San Francisco Railway Co. (Frisco), whom Burlington acquired circa 1979 (BN did not operate in Oklahoma prior to its acquisition of the Frisco system), Plaintiffs gloss over certain material and undisputed facts relative to the valuation history. Plaintiff casually admits at several points in its brief that BN's 1982 value was a "slight reduction" in its valuation for 1981.

Defendants submit that the following facts show that this phraseology, "slightly lower", is, at best, an euphemism. The Court's attention is respectfully directed to the affidavit of Gene Tyner, Sr., filed herein on April 28,

1983. Firstly, Mr. Tyner, a practicing economist who analyzed the historical assessments of BN/Frisco over a thirty-two year history, but in constant dollars, opined a "very significant historical reduction in assessed value" of Plaintiff since 1965. Next Mr. Tyner stated that 1982 represented a reduction from 1981 (again expressed in constant dollars) of approximately 16½%. This reduction (about 5/6 of BN's 1981 value) is what BN characterizes as only a "slight" reduction, and still one they argue, which is demonstrative of purposeful overvaluation.

The Court's attention is also respectfully directed to Exhibit "E" to Mr. Tyner's constant-dollar comparisons. The figures in the third column, "Value Returned by Railroad", are the very figures returned by BN/Frisco as its returned value or "self-assessment". The Court will note Frisco's 1950 returned value was \$15,925,965; i.e., self-assessed 32 years prior to the 1982 assessment year. Mr. Tyner selected 1965 as a bench-mark year, since that was the year Congress made an initial finding of railroad discrimination. See, Table at Page 11 of Oklahoma Tax Commission's initial Brief in Support of Motion to Dismiss, which Table was extracted from Senate Report (on Section 306) No. 1483. As stated, Oklahoma's assessment in 1965 was found by Congress to be 49% excessive (based not on valuation but upon an *excessive assessment ratio*). With that in mind, Exhibit "E", the last column, shows that by 1975, the Frisco was returning values that had cut their value in "real" or constant dollars by 51% of the 1965 self-assessed value. By 1981, BN (Frisco's successor) had returned a self-assessed value (\$14,333,355) which was 29.25% or less than 1/3 of its 1965 self-assessed value in real dollars. In 1982, the assessment year in question, BN claims an assessed value of \$5,737,450, or 10.71% (1/10) of its own self-assessed value in 1965.

For additional comparison of Plaintiff's historical treatment, the Court's attention is further directed to



Exhibit "F" to Mr. Tyner's Affidavit. There, Mr. Tyner undertakes essentially the same comparison in real or constant dollars, except he compares Oklahoma's final assessed value of the subject system in Oklahoma, rather than the railroad's returned (self-assessed) value. The year 1965 was used as a benchmark year, for the reason earlier stated. The fifth column, entitled "1965 assessment amount inflated", shows Oklahoma's 1965 assessed value, brought up to 1982 only upon the effects of inflation. By comparison in real dollars, the Oklahoma assessed value at issue, \$13,717,367, is *only 12.5% (exactly 1/8) of the value* Oklahoma assessed the subject railroad in 1965. It is important for the Court to note that this historical overview is based upon actual and official assessment figures maintained by the Oklahoma Tax Commission, Exhibit "A" to Tyner's Affidavit. To claim that Oklahoma has, especially since 1965, practiced "purposeful overvaluation" of this line, when its assessment is 1/8 of the 1965 assessment, and especially when its assessment for 1982 is *less than* the railroad's own returned (self-assessed) value for 1981, is absurd. The whole argument is *reductio ad absurdum*. It certainly does not represent a strong showing, from an historical perspective, of purposeful overvaluation.

There is, further, undisputed evidence, specifically learned after Mr. Tyner's affidavit, that illustrates that Oklahoma's value reductions, particularly those made in 1981 and 1982, were done contemporaneously with an enormous capital expansion by BN of its entire rail system.

On February 9, 1984, Defendants took the deposition of Mr. Robert F. Garland, Senior Vice-President for Finance and Planning of Plaintiff railroad. The annual stockholders' reports (Annual Reports) of BN, pursuant to ICC mandate, have for a number of years required track accounts to be stated, also, in terms of ratable depreciation. These restatements are in addition to the

balance sheet figures, which are stated in terms of Retirement Replacement, Betterment (RRB) Accounting. The 1982 Report (Exhibit "3" to Garland deposition) at page 39, shows the following caveat, which was highlighted at time of deposition:

"Assuming we had ratably depreciated our track structure, it is estimated that *net* properties would have *increased* \$1,696,468,000 . . .". (Emphasis added.)

The same restated (ratable depreciation) net property figure for track, according to the 1980 BN Annual Report (Exhibit "A" to this Brief) was:

"Assuming we had ratably depreciated our track structure, it is calculated *net* properties would have *increased* \$1,125,439,000 . . .". (Emphasis added.)

This is a net increase over a two-year (end of year to end of second year) period in track accounts of \$571,021,000. In the view of Defendants, this net increase could not have been caused by an accounting conversion or restatement, since the figures compared ratable depreciation 1980 to ratable depreciation in 1982. The net increase *must* have been occasioned by capital expansion as confirmed by Mr. Garland.

Assuming that Mr. Schoenwald's "value" of \$1,495,253,000 is accurate, the relatively current cost capital investment of \$571,021,000 during 1980 and 1981 would have been an increase over or addition to system value of roughly 38.19% of total system value. If one takes the 1982 Oklahoma system value of \$3,574,921,544 as accurate, the two year capital increase (investment) of \$571,021,000 is still an increase of roughly 15.97% over system value. Whether this significant capital increase was 15.97% or even 10%, it was still, in Mr. Garland's opinion, an expenditure for capital improvement of "a very substantial amount of money". The important thing for this

Court to note is the juxtaposition of these events; that is, Oklahoma was *reducing* value at the same time BN was significantly *increasing* its capital investment. Oklahoma reduced value in 1982 by 16½% from 1981's value at a time when BN increased value between 8-19% (½ the two-year expansion of between 15.9-38.19% of value). This hardly demonstrates a purposeful overvaluation.

Lastly, as stated by Chairman Nance in his deposition, Oklahoma's assessment ratio for 1982 was 10.87% of market value. This ratio was that determined by ratios applicable to local commercial and industrial properties *only*. Had Oklahoma desired, this ratio, and hence final assessed value, could have been *significantly increased* by weighting into the 10.87 figure the centrally assessed commercial properties, which were assessed at 26% for the 1982 year. This "weighting in" of centrally assessed properties has been uniformly approved by the federal courts under Section 306. See *Ogilvie v. State Board of Equalization of North Dakota*, 657 F.2d 204, 208-209 (8th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981). Therefore, a United States Circuit of Appeals had affirmed including centrally assessed properties, and the United States Supreme Court had denied certiorari, the year *preceding* the year in question. The Tax Commissioners were aware of their right to bolster the assessment ratio under *Ogilvie*, but declined to do so, opting for a conservative approach to valuation, in order to ensure they did not violate the 4-R Act. Nance Deposition, pages 94-96; Merrill Deposition, pages 64 (line 25) -66, where Commissioner Merrill stated in response to Plaintiff's question concerning central tendency (assessment ratio) for the 1982 year in question:

"A. Now, I believe your question was why had the Commission not previously assessed railroads at a common percentage, that percentage being the one which we believed to be the generally prevailing

central tendency at the local level among industrial and commercial properties all over the state. Prior to 1982, as I said, we did not look at these things, these ratios.

"Now, from my own past experience and my own knowledge of the perpetual, virtually perpetual, decline in the values of railroads, I was satisfied in my own mind that *we probably were in compliance with the 4-R Act* at the time of its enactment if not before; and, of course, the act in its very nature gave the states who might not be in compliance three years to clean up their act, so to speak. It did not become effective until February 5th, 1979 after then President Ford signed it into law in February 5th, 1976; and I for one was satisfied that as to the class we probably were in compliance.

"If, in fact, we might not have slipped a little bit below the maximum level which we could have imposed had we chosen to, *especially taking into account that a suspicion I had has later confirmed in I believe the Ogilvie case in Kansas*, at least, by a federal district judge that *it might just be proper to add in the other state assessed utilities and public service companies which are commercial, either commercial or industrial*, by their nature to these commercial and industrial properties which we found and analyzed at the local level. *We chose not to do that.*

"Again, I think that was an *indication of leniency, of giving the benefit of the doubt that might exist as to the valuation, and we chose not to raise that ratio any higher than the level which the ad valorem division director at that time, Mr. Bohr, told us from his ratio study efforts did appear to exist on the average at the local level among the 77 counties of Oklahoma.*



"Q. Let me ask you—

"A. And, so, 10.87 we presented, we accepted that and applied it once the appraisals had been made." (Emphasis added.)

Such a conservative approach to the lowest possible assessment ratio, even though federal law would have allowed higher ratio, and hence higher assessed valuation, can hardly justify Plaintiff's perceived "overview" of intentional and systematic overvaluation, in order to justify revenues or "maintain values". Plaintiff's brief at page 22.

With respect to the argument that Oklahoma sought to "maintain" railroad values, (Plaintiff's Supplemental Brief pages 21-22, footnote 10), Defendants would again refer the Court's attention to the undisputed evidentiary record of this case. *Every* class but railroads and airlines, since 1965, has increased. Railroads have enjoyed a steady decrease. This decrease in real dollars is again, greater than appears, because the effects of inflation would be to increase valuation. Affidavit of Gene Tyner, Sr. Even BN admits a decrease in railroad class from 1981 to 1982. Plaintiff's Supplemental Brief, footnote 10, which shows railroads as a class decreased in 1982 by \$1,686,904. It is interesting to note that BN's own decrease in assessed value was from \$15,014,650 (1981) to \$13,717,367 (1982) or a net decrease of \$1,297,283; i.e., BN received a lion's share (over  $\frac{2}{3}$ ) of the net decrease afforded railroads as a class. Assuming arguendo BN's argument that the OTC's "primary objective" was "maintaining aggregate railroad assessments at or near 1981 levels", Defendants respond that, given BN's healthy reduction (16½% for 1982), we must have stuck some railroad other than BN to "maintain its aggregate railroad levels".

In summary, the historical "overview" of railroads, especially of the BN/Frisco, decries BN's claim of purposeful, historical *overvaluation*.

## B. DIRECTION OF THE ASSESSMENT PROCESS IN OKLAHOMA.

As stated earlier herein, BN initially framed this cause as a valuation dispute resulting in a de facto assessment ratio stemming from its perceived "true market value". When the United States Court of Appeals for the Tenth Circuit in its *Lennen* decision *specifically rejected* such an approach as not falling within the actionable causes under Section 306, Plaintiff hastily amended to allege "purposeful overvaluation with discriminatory intent". By interrogatory, Defendants inquired exactly how and in what manner they "purposefully overvalued" Plaintiff's property for 1982. Interrogatory No. 1. The Plaintiff's answer is instructive:

"Answer: In making their assessments of Plaintiff's rail transportation property for the 1982 tax year, the Defendants were unconcerned with ascertaining the true market value of rail transportation property, *were oblivious to the correct method of determining the true market value of rail transportation property*, and were merely "result oriented", i.e., the Commission changed valuation methodologies and manipulated valuations to derive whatever "assessments" they deemed necessary for state purposes." (Emphasis added.)

The direction, "result oriented", of Oklahoma's assessment process is not BN's complaint. BN wants to order for the State of Oklahoma the correct valuation methodology. The "correct method" is, obviously, that touted by Arthur Schoenwald, the journeyman expert for this Plaintiff, who literally travels the country testifying in proceedings for this and other railroads. The direction of Oklahoma's valuation methodology is fully explained in Mr. Taylor's Affidavit (Appendices to Response, Exhibit I). This is the *direction*, i.e., greater weight to income coupled with increased capitalization rate(s) for



capitalized income, has historically been advocated by the railroads themselves. See Affidavit of Arthur Schoenwald. There is no serious dispute that the resulting effect of such an alteration, or *manipulation*, in methodology, at least with respect to the railroad industry, has the inevitable result of *decreasing* fair market value. This in fact occurred in 1982, as has been demonstrated heretofore. Accordingly, the untrue portion of BN's answer, mentioned above, is that methodology was changed in order to derive whatever assessments were "deemed necessary for state purposes". Query: if one intended to overvalue, why would one change valuation methods that had the inexorable result of *lowering* value? The answer is that instant Plaintiff disputes not the direction of the change in methodology, but only the *degree* in which that change occurred. Plaintiff advocates an even greater weight to capitalized income, and an even greater capitalization rate. Affidavit and Report of Arthur Schoenwald. The Court should again note, however, that Oklahoma's 1982 fair market value of BN's Oklahoma Property: \$126,194,733 (which resulted from the changed methods, assessed at a ratio of 10.87%, yields an assessed value of \$13,717,367, which is *less than* BN's own returned value (self-assessment) for the prior (1981) year, to-wit: \$14,335,355. Obviously, Oklahoma moved in a direction to better meet BN's expectations of value (whether these expectations are in fact justified or not). This lawsuit was occasioned by virtue of the fact that the Plaintiff thinks Oklahoma did not move *far enough* in that direction. This is hardly the case for either purposeful overvaluation or intentional discrimination.

The Plaintiff was next asked by Interrogatory the facts relied upon to justify the alleged purposeful overvaluation. With particular respect to what was allegedly done during the year in question: 1982, the Plaintiff addressed those facts in paragraphs f-h of its second answer to Interrogatories:

"f. Mr. Bohr *resigned* in January, 1983. Although he did not formally recommend an assessment of BN's property for the 1982 tax year, he participated in the computation of a recommended assessment. Bohr Deposition, p. 25; Deposition of Robert Hartman. In making its assessments of rail transportation property for the 1982 tax year, the Commission applied for the first time the same assessment ratio to all railroads, *the Commission substantially increased its estimates of railroad values*; the Commission denied BN any economic or functional obsolescence, and *fixing a value which far exceeded the value that had (according to Mr. Bohr's statements to BN's representative) formed the basis for BN's 1981 assessment*. Bohr Deposition, p. 71; Compare Bohr Deposition, Exhibit 8 with Exhibit 11. As alleged in BN's complaint, the Commission's 1982 value is grossly in excess of true market value. Affidavit of Mr. Arthur A. Schoenwald.

"g. For the 1982 tax year, Deloitte, Haskins & Sells performed a qualitative analysis of the Commission's valuation methodologies and procedures and recommended significant changes in those methodologies and procedures. The methodologies and procedures recommended by Deloitte, Haskins & Sells are, in all essential respects, identical to the valuation methodologies employed by BN's valuation expert. Deposition of William Peak. Such methodologies would, if implemented, undoubtedly result in a substantially lower estimate of the true market of BN's property than that fixed by the Commission. Dr. Arthur A. Schoenwald.

"h. [REDACTED] Deloitte, Haskins & Sells was contractually obligated to advise the Commission on the degree to which the Commission valuation methodologies complied with industry standards. BN anticipates that the further deposition of Mr. Peak will show that the

Commission was advised that its methods did not meet industry standards." (Emphasis added.)

Chronologically with respect to the above-quoted "facts" Mr. Bohr did not "resign" on January 1, 1983; he retired as a vested state employee. Bohr Deposition, page 6, line 10. It is true that in 1982, and beyond, the Commission mandated that the same or uniform assessment ratio be applied to railroad values.

The next issue is one, purportedly factual, which underlies much of Plaintiff's attempt to imply overvaluation and attain federal jurisdiction. The Plaintiff states that (for 1982) "the Commission *substantially increased* its estimates of railroad values". (Emphasis added.) According to BN, the State Board established a system fair cash value for BN for 1981 of \$2,107,321,200. That is categorically untrue. (See Response, paragraph 25, filed herein.)

This Court's attention is respectfully directed to the Affidavit of J. L. Merrill (Exhibit J to Defendant's Response) and specifically to the attachment thereto entitled "Railroads". It is important to note that the attachments *are* official records of the OTC. Further, they were prepared in *advance* of the determination of the 1982 assessment in question, so that the OTC could equalize the disparate assessment ratios it found had existed during 1981. See Affidavit of J. L. Merrill, page 41, line 22 through page 49, line 3. In his deposition, specifically, at page 48, line 1, Commissioner Merrill states:

"A. Well, since this (referring to Exhibit J, document which at the time it was prepared or at least what it *purports to show was history already set in concrete*. This is a *representation of what had been done and had been approved by the Commission in 1981 which had subsequently been approved by the State Board of Equalization*. And, without going

behind the face of what I see here, *all I know is that these were the assessed values approved*." (Emphasis added.)

Exhibit J, attachment entitled "Railroads" prepared before this litigation, indeed prepared before BN's 1982 assessment had even been determined, reflects the official recommendations of the OTC in 1981, and reflects, according to Mr. Merrill's testimony, the official act of the State Board in approving this recommendation. This official pre-litigation document plainly provides with respect to BN's assessment for 1981 in pertinent part:

"Name:	Burlington-Northern Inc.
Current (1981) Assessment:	\$ 15,014,650
Cash Value 1981:	\$136,621,019
Current (1981) Ratio:	<u>10.99."</u>
(Emphasis added.)	

This official document shows that the 1981 official ratio was 10.99% of Oklahoma fair cash value. It further shows that BN's Oklahoma fair cash value for 1981 was officially determined as \$136,621,019.00.

The Plaintiff seeks to create a factual controversy through the Affidavits of Thomas Wehner, who "really knows" what the State Board did and testifies or opines that the real assessment ratio for 1981 was 19%. Mr. Wehner is incompetent to give this testimony. However, the Court can notice that, assuming the competence and truth of Wehner's testimony, a clear violation of the 4-R Act *would have occurred, but in 1981*, when the assessment ratio of 19% clearly exceeded the permissible variance under the 4-R Act.

#### JURISDICTIONAL REQUIREMENTS UNDER LENNEN

In *Burlington Northern Railroad Company et al. v. Lennen, et al.*, supra, decided by the United States Court of Appeals for the Tenth Circuit on August 25, 1983,



writ of certiorari to the United States Supreme Court pending, the lower court's refusal to hear the valuation issue was affirmed.

Most of the railroads involved in *Lennen*, supra, had substantial increases in their property valuations between 1981 and 1982. The procedures used by the state were found to have been used for a long period prior to the 1982 valuations by Kansas. Judgment of the state tax administrator accounted for the increase.

The Tenth Circuit held "that a suit can be maintained whenever a railroad can make a strong showing of purposeful overvaluation of a particular railroad's property with discriminatory intent . . .". (Page 496.)

Plaintiff directs attention to the fact that *Lennen*, supra, went to the Tenth Circuit on a denial of a preliminary injunction, not a Motion to Dismiss. And, Plaintiff asserts that no other valuation case has been dismissed for want of subject matter jurisdiction, citing *Missouri Pacific R.R. v. Mauer*, No. CI 82-C-1445 (1982, D.C. Colo.). Both the *Lennen* and *Mauer* cases, supra, involve issues other than valuation, while this case is a pure valuation, single issue case.

Judge Rogers' decision in *Lennen*, Case No. 82-1561 (D.C. Kans. Dec. 9, 1982) recited in detail the congressional history of § 11503, supra, and in particular the admonition from the United States Justice Department that constitutional issues would be raised if federal courts were required to perform valuation of properties. Congress was advised that the courts can and should construe this legislation to avoid any charge that a non-judicial function (valuation) is required to be performed.

Indeed, Congress had no misconception about the term "value" and the necessity, legal and practical, to keep the federal district courts out of the quagmire of valuation. The Senate Committee on Commerce, Appendix B to Report 1483 (see pages 12-14, Brief in Support of Motion

to Dismiss) succinctly stated that Congress did not have before it a standard for the states to determine "value" (fair market value/fair cash value/full market value/true market value); rather, it had a bill that sets a standard for rail transportation property to be assessed at the same percentage of the given value as other commercial and industrial property in the State.

Appendix B found that the term "value" had already been judicially defined, citing three of numerous cases, to-wit: *New York Bay R. Co. v. Kelly*, 22 N.J. Misc. 204, 37 A.2d 624, 628 (1944); *Fort Worth & D.N. Ry. Co. v. Sugg* (Tex. Civ. App.) 68 S.W.2d 570, 472 (1934); and, *Guyandotte Valley R. Co. v. Buskirk*, 57 W.Va. 417, 5 S.E. 521, 526 (1905).

At pages 628-629, in the *New York Bay R. Co.* case, supra, an ad valorem tax valuation case, the New Jersey Court stated and concluded:

"(1,2) The 'true value' at which property is required to be assessed by an assessor is that price which would be paid for the property on the assessing date in a sale between a willing seller, not compelled to sell, and a willing purchaser not compelled to purchase, by private contract at a fair and bona fide sale. While properties such as the developed road waterfront terminals under appeal are never actually sold or purchased, the duty is nevertheless cast upon the assessor to conceive of a hypothetical sale and to assess the property for taxation at a price which requires a consideration of all of the uses to which the properties under appeal are adapted and for which they might be purchased, either as entireties, or in selected portions. We cannot imagine a use to which any of these terminals would be better adapted as entireties, than the uses to which they are now put, i.e., as railroad waterfront terminals. Limited parts of the waterfront



might have a greater utility for steamship purposes, if considered separately.

*"We conclude that the determination of the extent of decline is a matter which calls for the exercise of sound and experienced judgment on the part of the valuator. Equally well informed and competent experts may honestly have the widest range of difference of opinion on this subject. The expert testimony in this case is radically conflicting. We cannot say that the judgment in this matter of the statutory assessor, the State Tax Commissioner, as reflected by the gross reductions of 19% in this valuations in 1936 and 1939 is erroneous. This seems almost inevitable because of the emphasis which has been placed by the courts upon the statutory right of the assessor of railroad property to use his 'personal knowledge and judgment' in the valuation of such property.*

In *Central R. Co. v. State Board of Assessors*, 49 N.J.L. 1, at page 9, 7 A. 306, 310, the court stated:

*"We do not consider that we have the right to alter or annul any of the proceedings of this body of officers except for palpable error; for it is not to be overlooked that the statute in question expressly declares that these assessors 'shall be entitled to use their personal knowledge and judgment as to the value of the property',—a capacity with which this court is not endowed by the legislature." (Emphasis added.)*

At page 525, in the *Guyandotte Valley Ry. Co.* case, *supra*, a condemnation for railroad purposes case, the high court of West Virginia stated:

*"But the defendants seem to think the term 'market value' has some peculiar meaning or significance which precludes the introduction of certain kinds of evidence and directs inquiry by the jury to some*

value other than that which, upon consideration of all the evidence bearing upon the question of value, they think is the actual value of the property. This necessitates an inquiry into the meaning and purpose of the market value rule.

\* \* \* \*

*"The use to which the owner has applied his property is of no importance, beyond its influence upon the present value. If highly cultivated, it will be worth more than if suffered to run to waste. \* \* \* What price will it bring in the market? That is the proper inquiry in a proceeding of this kind. As between individuals the owner may demand any price, however exorbitant, for his property; but when it is taken for public purposes he can only demand its real value. That value cannot depend in any degree on his own will. To allow either his judgment or his fancy in relation to the proper use of the property to influence the question would be to make the estate either more or less valuable, as it might happen to be possessed by one individual or another." Another value which it would be obviously unjust to adopt is the value to the appropriator for the purpose for which it is taken, another special utility value, instead of the value for all purposes to which the property is adapted. If this were permitted, a city, town, county court, school board, or railroad company might be made to pay many times the actual value of a piece of property indispensable to its purposes. Another kind of value guarded against by this rule is the speculative value. *Muller v. Railway Co.*, 83 Cal. 240, 23 Pac. 265." (Emphasis added.)*

Relying upon these cases to define "value", the Congressional Committee Report guards against invasion of the federal courts upon the states' authority to determine the valuation process or valuation methodology and recognizes the hypothetical nature of the task of the local

tax administrators and the inherent need for exercise of judgment by those local tax administrators.

However, BN urges this Court to endow itself as a tax administrator, thereby providing BN with the opportunity to convince the Court that BN's valuation expert is right.

The Tenth Circuit refused to give BN the opportunity to seek relief from a pure valuation dispute, relegating BN to its remedy provided by state law for grievances alleged by defacto assessment percentage discrimination or overvaluation.

Defendants propose that this Court find that Plaintiff may not maintain this pure valuation suit as Plaintiff has failed to make a showing of a strong prima facie case of purposeful overvaluation with intentional discrimination.

#### PRE-TRIAL PROCEDURE UNDER RULE 12(b) (1)

Plaintiff poses that Defendants' Motion to Dismiss be treated as a Motion for Summary Judgment under Rule 56; that the standard for a ruling on Defendants' Motion is whether Plaintiff has raised a genuine issue of material fact.

Defendants will say one more time, there exists a genuine valuation dispute between the parties.

Defendants' Motion to Dismiss goes to Plaintiff's lack of showing to this Court that the dispute is reached by the special remedy in § 11503, *supra*.

Plaintiff relies upon *Baker v. Hunn Roofing, Inc.*, 399 F.Supp. 628 (W.D. Okl. 1975) for its argument that Defendants' Motion should be governed by Rule 56.

*Baker v. Hunn Roofing, Inc.*, *supra*, was a personal injury action brought by the parents of a 13 year old who was seriously injured in the course of his employ-

ment, carrying hot tar, when he spilled a bucket of hot tar over his entire body. Defendant filed a Rule 12(b) (1) Motion to Dismiss alleging that the exclusive remedy was under the Worker's Compensation Act. Plaintiff responded that violation of the child labor laws prevented the remedy under the Worker's Compensation Act. The Court held that whether Plaintiff's employment was especially hazardous, and thus in violation of the child labor laws, was a question of fact for the jury and denied the Motion to Dismiss for lack of subject matter jurisdiction.

This case does not support Plaintiff's assertion that Defendants' Motion to Dismiss should be governed by Rule 56, nor does it stand for the proposition that this Court should defer ruling on Defendants' Motion until trial on the merits.

Plaintiff also relies on *Schramm v. Oakes*, 352 F.2d 143 (10th Cir. 1965) to support its argument that Plaintiff's Complaint should not be summarily dismissed without the ordinary incidents of a trial.

In *Schramm*, *supra*, the Tenth Circuit, for the third time on appeal, had before it a complicated automobile collision case, with laws of several jurisdictions involved. In discussing Rule 12(d), the Court stated at page 149:

"... Rule 12(d) of the Federal Rules of Civil Procedure clearly contemplates a preliminary hearing and determination of jurisdictional issues in advance of trial unless the court defers such action until the time of trial. Furthermore, as there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the Court. *Gibbs v. Buck*, 307 U.S. 66, 59 S.Ct. 725, 83 L.Ed. 1111. Certainly the trial court may gather evidence on the question of jurisdiction by affidavits or otherwise in an effort to determine the facts as they exist, *Wetmore v. Rymer*, 169 U.S. 115, 18 S.Ct. 293, 42 L.Ed. 682 and *KVOS, Inc. v. Associated Press*, 299



U.S. 269, 57 S.Ct. 197, 81 L.Ed. 183, and based upon the evidence so obtained, decide the jurisdictional dispute before trial."

The Court found, on page 149, that "... we are unable to say with a degree of legal certainty that the appellants could not make out a valid cause of action against one or more of the appellees. The evidence is as yet inconclusive as to who was the owner of the automobile at the time of the collision."

The evidence in the instant suit is certainly inconclusive as to purposeful overvaluation with discriminatory intent. In fact the overwhelming impact of the evidence in this suit is the clear absence of any intentional overvaluation and the clear absence of any intentional discrimination. And, the evidence cogently shows intentional uniformity in the 1982 assessment procedure and intentional regard for the mandates of § 11503, *supra*.

Plaintiff does not cease its attempt to convince this Court that it should proceed to trial with its Rule 56 argument. Plaintiff further poses that this Court should equate "purposeful" with "systematic". Certainly the Defendants' acts are systematic, although not with the color plaintiff paints.

Plaintiff, at page 8 of its Supplementary Brief quotes *Southland Mall, Inc. v. Garner*, 455 F.2d 887 (6th Cir. 1972), to urge this Court to make inferences of discrimination. Plaintiff quotes one sentence, out of context, to-wit:

" 'Assuming, as we must, that public officials rarely admit wrong doing we must accept circumstantial evidence of improper intention.' "

The entire paragraph, explaining the failure of taxpayer to show discrimination, reads as follows:

"While we do not read *Cumberland Coal* to hold that failure to consider relevant factors establishes

discriminatory intent *per se* neither does our view preclude reliance on such omission as some evidence of discrimination. Assuming, as we must, that public officials rarely admit wrong doing, we must accept circumstantial evidence of improper intention. If, for instance, Appellant had been able to demonstrate that the omitted factors had time and again been held relevant in *comparable* situations by these same officials or that appraisal practice was so clearly settled that no reasonably intelligent man could believe correct the omission of a particular factor which had properly been called to his attention, then we might take the serious step of inferring intentional discrimination. See *Coulter v. Louisville & N. R.R. Co.*, *supra*. The District Court held and we agree that Appellant has not presented any proof which even approaches the required level."

At page 889, the Southland Mall Court stated:

"Relief cannot be predicated upon mere errors of judgment committed by tax officials, . . ."

"The federal courts have rigorously enforced the rule that discriminatory intention must be shown least routine complaints about the accuracy of an assessment, more properly heard in a state court familiar with local practice, clog the federal docket, disturbing federal-state relations and rendering the federal courts 'board(s) of tax review'. *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U.S. 362, 367, 60 S.Ct. 968, 84 L.Ed. 1254 (1940). In explaining the intention which must be shown, the Supreme Court has stated: 'There must be something that amounts to an intention, or the equivalent of *fraudulent* purpose, to disregard the fundamental principal of *uniformity*.' *Rowley v. Chicago & Northwest Railway*, 293 U.S. 102, 111,



55 S.Ct. 55, 59, 79 L.Ed. 222, (1934).” (Emphasis added.)

Plaintiff *does not* attack Defendants’ intention to assure the fundamental principle of uniformity, which was the deliberate and expressed intent of the OTC in making its findings and recommendations to the State Board in 1982.

Plaintiff argues that the United States Supreme Court, in *Great Northern Ry. Co. v. Weeks*, 297 U.S. 135, 56, S.Ct. 426 (1936), inferred purposeful discrimination by the tax officials who disregarded the economic conditions of the U.S. from and immediately after the 1929 crash, to support its position that this Court should infer discrimination. However, the Supreme Court found the assessment to be arbitrary for failure to consider changed economic conditions, refusing to consider discrimination, at p. 152:

“We need not consider whether the assessment is repugnant to the equal protection or commerce clause. Unquestionably, the assessment was made in plain violation of established principles that govern property valuation.”

Plaintiff’s “most significant” case upon which it relies to persuade this Court to infer intentional discrimination is *Louisville & Nashville R.R. v. Public Service Commission*, 249 F.Supp. 894, 902 (M.D. Tenn. 1966). In *Louisville & Nashville R.R. v. Public Service Commission*, supra, the lower court in Tennessee had the same facts before it that had been presented to the U.S. Supreme Court in *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 60 S.Ct. 968, 84 L.Ed. 1254 (1940). The Tennessee district court had before it the assessment practice of more than sixty years in Tennessee: different, higher assessment percentages for railroad and utility properties. The Tennessee district court, ruled, as a matter of law, that the assessment practice violated Tennessee law.

In response, Defendants propose this Court hold plaintiff to the various evidentiary rules it propounds. The record is void as a scintilla of evidence of unequal treatment as among the railroads as to valuation or assessment ratio. Indeed, Plaintiff has not even alleged historical Fourteenth Amendment or Interstate Commerce Clause violations. Its only disputed allegations are those of overvaluation, and unlike the disregard for the economic conditions known as the Great Depression, Plaintiff estimated its *increase* to net properties in 1982 to be \$1,696,468,000.00. (1982 Report, Exhibit 3 to Garland Deposition.)

Defendants further propose that this Court proceed to consider the Rule 12(b)(1) Motion to Dismiss as contemplated in Rule 12(d) and thereupon dismiss Plaintiff’s pure valuation Complaint for lack of subject matter jurisdiction under the Tenth Circuit decision in *Lennen*, supra.

## CONCLUSION

Plaintiff alleges a pure valuation controversy. Defendants do not deny the existence of the valuation dispute.

Plaintiff has the burden of establishing a strong prima facie case of purposeful overvaluation with discriminatory intent to maintain this lawsuit over Defendants’ Motion to Dismiss.

Plaintiff offers this Court parole evidence which does no more than attack the credibility of official records and testimony of state officers and employees, which under state and federal law as presumed to be correct. 68 O.S.1981, § 2468 and 49 U.S.C. § 11503.

Plaintiff has wholly failed to make a strong showing of purposeful overvaluation with discriminatory intent. Neither Mr. Wehner’s opinions of Mr. Bohr’s opinions, nor BN’s expert’s, Mr. Schoenwald, opinions of valuation methodology demonstrate purposeful overvaluation with discriminatory intent.

In 1982 the OTC and the State Board intended to uniformly apply the assessment percentage to the valuations of the taxable rail transportation property within Oklahoma. That intention was accomplished.

WHEREFORE, Defendants respectfully request this Honorable Court to proceed to consider their Rule 12 (b) (1) Motion to Dismiss instant, and thereupon, to dismiss the purported Complaint herein, with costs to Defendants.

Respectfully submitted,

OKLAHOMA TAX COMMISSION  
STATE BOARD OF EQUALIZATION  
Defendants

By: /s/ J. Lawrence Blankenship  
J. LAWRENCE BLANKENSHIP  
General Counsel

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[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-419R

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Plaintiff,*

vs.

OKLAHOMA TAX COMMISSION; ODIE A. NANCE, CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; ROBERT T. WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,

*Defendants.*

No. CIV-83-2165-R

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; ST. LOUIS SOUTHWESTERN RAILROAD COMPANY,

*Plaintiffs,*

vs.

OKLAHOMA TAX COMMISSION; ODIE A. NANCE, CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; ROBERT T. WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF



THE OKLAHOMA TAX COMMISSION; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,

*Defendants.*

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[Filed April 29, 1985]

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### ORDER

On January 8, 1985 the Court granted the Defendants' Motions to dismiss for lack of subject matter jurisdiction in the above styled cases. The Plaintiff timely filed a Motion For New Trial. Or in the Alternative, For Vacation, Amendment, Or Alteration of Judgment pursuant to Fed. R. Civ. P. 59, to which the Defendants responded in opposition. The motion has been fully briefed, and the Court is now prepared to dispose of it, and an unrelated Motion for Consolidation, in this Order.

It must first be noted that the Plaintiff's motion is cognizable only as a Motion to Alter or Amend Judgment under Fed. R. Civ. P. 59(e). See *Cook v. Atlantic Richfield Co.*, No. CIV-83-1717-R (W.D. Okla. March 20, 1985). A Motion for New Trial pursuant to Fed. R. Civ. P. 59(a) is appropriate only where trial on the merits has been conducted, see *Jones v. Nelson*, 484 F.2d 1165, 1167 (10th Cir. 1973), and no such trial has been conducted in either of these cases. However, it is clear that the Plaintiff's Fed. R. Civ. P. 59 (e) motion properly challenges the Court's January 8 order of dismissal. *Cook*, slip op. at 1. See also *St. Paul Fire & Marine Insurance*

*Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982).

The Plaintiff first argues that the order of dismissal should be vacated in the 1982 tax case, No. CIV-83-419-R, for two reasons: (1) The Court erred in determining the jurisdictional issue without hearing live testimony; and, (2) the Plaintiff has discovered new evidence of discriminatory intent regarding the 1982 tax year. The second proposition is now moot, as the Court has refused to allow discovery from the witnesses that the Plaintiff sought to depose for its newly discovered evidence. *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, No. CIV-83-419-R, slip op. at 2-3 (W.D. Okla. Jan. 23, 1985). And the first proposition is without merit. The Court considered the facts bearing upon jurisdiction in the light most favorable to the Plaintiff, and live testimony would have lent nothing to the Plaintiff's abortive attempt to establish a *prima facie* case of intentional discrimination. The Plaintiff again seeks to have the Court hear the merits of the action before deciding the jurisdictional question, a procedure rejected as violative of the restrictive jurisdictional rule announced in *Burlington Northern Railroad Co. v. Lennen*, 715 F.2d 494 (10th Cir. 1983), cert. denied 104 S. Ct., 2690 (1984). See *Burlington Northern v. Oklahoma Tax Commission*, No. CIV-83-419-R, slip op. at 7-9 (W.D. Okla. Jan. 8, 1985). The Court therefore concludes that the Plaintiff's motion is denied insofar as it seeks a vacation of the order of dismissal in the 1982 tax case.

However, the Court is persuaded that the motion must be granted insofar as it challenges dismissal in the 1983 tax case, No. CIV-83-2165-R. The Court, noting that the Plaintiff had failed to supplement the record in connection with its opposition to dismissal in the 1983 case, concluded that the Plaintiff intended to support its jurisdictional allegations in both cases with the same evidence.



*See Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, No. CIV-83-2165-R, *slip op.* at 15 (W.D. Okla. Jan. 8, 1985). However, the Plaintiff now contends, and the Defendants do not seriously dispute, that the parties had agreed to litigate the jurisdictional question in the 1983 tax case only after the Court had ruled on the similar question in the 1982 tax case. The record reflects at least a tacit agreement between the parties, and the Court concludes that the lack of an evidentiary record in No. CIV-83-2165-R results from this agreement. The order of dismissal in the 1983 tax case was therefore premature, and the Court accordingly grants the Plaintiff's motion to the extent that the order of dismissal in No. CIV-83-2165-R is vacated.

There can be little doubt that the Plaintiff intends to appeal the Court's dismissal of the 1982 tax case upon receipt of this Order. Indeed, the Court prefers that its decision be examined on appeal before further proceedings are had in the 1983 tax case. Accordingly, the Plaintiff's Motion for Consolidation of the two cases is denied, and No. CIV-83-2165-R is stayed pending appeal of No. CIV-83-419-R. For the duration of the stay No. CIV-83-2165-R shall be administratively closed, to be reopened upon final disposition of No. CIV-83-419-R.

In summary, the Court reaches the following conclusions:

1. The Plaintiff's Motion For New Trial, Or In The Alternative, For Vacation, Amendment, Or Alteration of Judgment is denied to the extent that it challenges dismissal of No. CIV-83-419-R.
2. The Plaintiff's Motion For New Trial, Or In the Alternative, For Vacation, Amendment, Or Alteration, of Judgment is granted to the extent that it challenges dismissal in No. CIV-83-2165-R.
3. The order of dismissal in No. CIV-83-2165-R is vacated.

4. The Plaintiff's Motion for Consolidation is denied.
5. Case No. CIV-83-2165-R is stayed and administratively closed pending appeal of the Court's decision in Case No. CIV-83-419-R.

The parties are directed to keep the Court apprised of the appellate proceedings in No. CIV-83-419-R.

IT IS SO ORDERED this 29th day of April, 1985.

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DAVID L. RUSSELL  
United States District Judge

No. 86-337

Supreme Court, U.S.  
FILED

DEC 12 1986

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Petitioner,*

v.

OKLAHOMA TAX COMMISSION, *et al.*,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

**BRIEF FOR PETITIONER**

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December 12, 1986

## QUESTIONS PRESENTED

I. The principal question presented is whether the Tenth Circuit erred in holding that section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, which prohibits discriminatory state taxation of railroads, provides no remedy for discrimination resulting from overvaluation of railroad property unless the railroad can, before trial, make a "strong showing" of "purposeful overvaluation . . . with discriminatory intent."

II. A secondary question presented is whether, even if the Tenth Circuit's interpretation were correct, the courts below erred in dismissing Burlington Northern's complaint without a trial on the merits where there was a factual dispute as to discriminatory intent.



# **LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES**

## **Burlington Northern Railroad Company:**

The Belt Railway Company of Chicago  
 Burlington Northern Dock Corporation  
 Burlington Northern (Manitoba) Limited  
 Burlington Northern Railroad Properties Inc.  
 Camas Prairie Railroad Company  
 Clarkland Royalty, Inc.  
 Davenport, Rock Island and  
   North Western Railway Company  
 The Denver Union Terminal Railway Company  
 Houston Belt & Terminal Railway Company  
 Iowa Transfer Railway Company  
 Kansas City Terminal Railway Company  
 Keokuk Union Depot Company  
 The Lake Superior Terminal and  
   Transfer Railway Company  
 Longview Switching Company  
 The Minnesota Transfer Railway Company  
 Paducah & Illinois Railroad Company  
 Portland Terminal Railroad Company  
 The Saint Paul Union Depot Company  
 Terminal Railroad Association of St. Louis  
 Trailer Train Company  
 Western Fruit Express Company  
 The Wichita Union Terminal Railway Company  
 Winona Bridge Railway Company  
 Northern Radio Ltd.

BN Financial Services Inc.

BN Geothermal Inc.

BN Leasing Inc.

Burlington Northern Foundation

Burlington Northern International Services Inc.

  Burlington Northern Trading Company Inc.

Burlington Northern Motor Carriers Inc.

  BNMC Leasing Inc.

Burlington Northern Overseas Finance Company N.V.

Colt Intermodal Inc.

Glacier Park Company

  Dreyer Bros., Inc.

  Glacier Arizona Company

  Glacier Park Boulder Company

  Glacier Park Denver Company

  Glacier Park Orillia Company I

  Glacier Park Riverpoint Company

  Heritage Glacier Park Company

  Kalispell Glacier Park Company

  Tennessee Glacier Park Company

Glacier Park Liquidating Company

Meridian Minerals Company

  Granite Falls Rock

  Meridian Aggregates Company

  Saxony Corporation

M-R Holdings Inc.

M-R Holdings Acquisition Company

M-R Holdings Inc. No. 1 (Through No. 7)

  Southland Royalty Company

    Southland Gathering Company

    Southland Pipeline Company

    SRC Production Company

    SRC Realty Company

National Exchange, Inc.

  National Exchange Satellite, Inc.

New Mexico and Arizona Land Company

  NZ Development Corporation

  NZ Properties, Inc.

Plum Creek Timber Company, Inc.

  Plum Creek Foreign Sales Corporation

Research Applications Inc.

The El Paso Company	
El Paso Natural Gas Company	
BEM Holding Corporation	
El Paso Del Peru Company	
El Paso Development Company	
Ex-Mission Ranches, Inc.	
Windjammer, Inc.	
El Paso Gas Marketing Co.	
El Paso Hydrocarbons Company	
El Paso Frontera Corporation	
El Paso Gas Transportation Company	
El Paso Hydrocarbons Gas Processing Company	
El Paso Hydrocarbons NGL Company	
El Paso Hydrocarbons Pipeline Company	
El Paso Hydrocarbons Service Company	
El Paso Hydrocarbons Transportation Company	
El Paso Storage Company	
West Lake Natural Gasoline Company	
Odessa Natural Gasoline Co.	
Odessa Pipeline Company	
Pecos Company	
Trebol Drilling Company	
El Paso Mojave Pipeline Co.	
El Paso Natural Gas Building Company	
El Paso Natural Gas Clearinghouse Company	
El Paso Production Company	
Meridian Oil Holding Inc.	
Meridian Oil Inc.	
Butte Pipe Line Company	
Meridian Oil Pipeline Company	
Meridian Oil Trading Inc.	
Northern Rockies Pipe Line Co.	
Portal Pipe Line Company	
Meridian Oil Production Inc.	
EPX Company	
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

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No. 86-337

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BURLINGTON NORTHERN RAILROAD COMPANY,  
*Petitioner,*

v.

OKLAHOMA TAX COMMISSION, *et al.,*  
*Respondents.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

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**BRIEF FOR PETITIONER**

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**OPINIONS BELOW**

The order and judgment of the Court of Appeals, which is not reported, appears in the Appendix to the Petition for Certiorari (Pet. App.) at 1a to 5a. The order of the United States District Court for the Western District of Oklahoma, which is also unreported, appears in Pet. App. at 6a to 17a.

**JURISDICTION**

The order and judgment of the Court of Appeals was entered on May 2, 1986. This Court granted the petition for writ of certiorari on October 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1982).<sup>1</sup>

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<sup>1</sup> On November 25, 1986, the time for filing of this Brief was extended to and including December 12, 1986.



## STATUTORY PROVISION INVOLVED

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54 (codified at 49 U.S.C. § 11503 (1982)), is set forth in Pet. App. at 20a to 22a.<sup>2</sup>

## STATEMENT OF THE CASE

### 1. Introduction

This case presents a fundamental question in the interpretation of section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"). Section 306 declares discriminatory state taxation of railroad property to be an unreasonable burden on interstate commerce, and authorizes federal courts to provide relief from such discrimination.

The District Court, without a trial, dismissed Burlington Northern's complaint alleging that the Oklahoma taxing authorities had discriminatorily overvalued its railroad property.<sup>3</sup> The Court of Appeals affirmed, relying

<sup>2</sup> Although the language of § 306 was modified when the provision was recodified in 1978 at 49 U.S.C. § 11503 (1982), the recodification effected no substantive change, and the original language is authoritative. Act of October 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466 (1978); H.R. Rep. No. 1395, 95th Cong., 2d Sess. 9-10 (1978); see *Richmond, F. & P. R.R. v. Department of Taxation*, 762 F.2d 375, 377 (4th Cir. 1985); *Southern Ry. v. State Board of Equalization*, 715 F.2d 522, 523 & n.1 (11th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); *Clinchfield R.R. v. Lynch*, 700 F.2d 126, 128 n.1 (4th Cir. 1983). Accordingly, the Appendix to the Petition for Certiorari sets forth § 306 as originally enacted, and that language will be cited throughout this Brief.

<sup>3</sup> Respondents are the Oklahoma Tax Commission, the State Board of Equalization of the State of Oklahoma, and the respective members of those agencies: Odie A. Nance, Robert T. Wadley, J.L. Merrill, George Nigh, Spencer Bernard, Leo Winters, Jack Craig, Clifton Scott, Dr. Leslie Fisher and Mike Turpen. Jurisdiction

on its own prior ruling that when state tax discrimination results from the overvaluation of railroad property, a federal court has no jurisdiction unless the railroad makes a strong pretrial showing of "purposeful overvaluation . . . with discriminatory intent." Pet. App. 2a.

### 2. The Origin and Scope of Section 306

Throughout the two decades leading up to the passage of the 4-R Act in 1976, Congress wrestled with the distressed financial condition of the Nation's railroads. State tax discrimination against interstate railroads was a significant element both of the problems that led to the near collapse of the private rail industry, and of the solution Congress ultimately chose.

Attention was first focused by the 1961 "Doyle Report," which attributed the drastic decline of the railroad industry largely to outmoded federal and state laws and regulations.<sup>4</sup> Over the following years, both the financial troubles of the railroads and the need for federal intervention became increasingly acute.<sup>5</sup> Fifteen years after

in the District Court was premised on 49 U.S.C. § 11503 (1982), and 28 U.S.C. §§ 1331 & 1337 (1982).

<sup>4</sup> Special Study Group on Transportation Policies in the United States, Senate Comm. on Commerce, National Transportation Policy, S. Rep. No. 445, 87th Cong., 1st Sess. (1961) [hereinafter Doyle Report]. The Report, over 700 pages in length, was issued under the staff direction of Major General John P. Doyle, and pursuant to three Senate resolutions of the 86th Congress.

The Doyle Report dealt extensively with discriminatory state taxation of railroads. *Id.* at 445-91. It initially recommended the complete exemption of railroad right-of-way from state taxation, and as an alternative suggested the antidiscrimination approach ultimately adopted in § 306. *Id.* at 463-66. See *infra* at 22-23 & n.32 for further discussion of the Report's findings.

<sup>5</sup> See, e.g., Due, *A Comment on Recent Contributions to the Economics of the Railroad Industry*, 13 J. Econ. Literature 1315, 1315 (1975) (inadequate earnings of the railroad industry a problem "endemic for two decades"); Weinberg, *Working on the Railroad: An Urgent Agenda for Congress*, 20 N.Y.L.F. 731 (1975);

the Doyle Report, Congress enacted the 4-R Act.<sup>6</sup> In that legislation, the federal government took its first steps to strip away the layers of overregulation and discriminatory legislation that had helped reduce the railroads from the powerful monopolists of the nineteenth century to the weak links of the Nation's transportation system.<sup>7</sup>

One major feature of the 4-R Act was relief from state tax practices that imposed a disproportionate tax burden on railroad property.<sup>8</sup> Congress recognized that because interstate railroads are not adequately represented in local legislative bodies, and because their facilities cannot readily be relocated, they "are easy prey for State and local tax assessors." S. Rep. No. 630, 91st

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Prince, *Railroads and Government Policy—A Legally Oriented Study of an Economic Crisis*, 48 Va. L. Rev. 196, 202, 232 (1962) (railroad "financial crisis" due in part to discriminatory state taxation).

<sup>6</sup> The legislative history of the 4-R Act reveals that Congress intended to remedy a host of problems that had resulted in the bankruptcies of eight major railroads and had left virtually the entire industry in a precarious financial condition. S. Rep. No. 499, 94th Cong., 1st Sess. 2-3 (1975) [hereinafter S. Rep. No. 94-499]; H.R. Rep. No. 725, 94th Cong., 1st Sess. 53 (1975) [hereinafter H.R. Rep. No. 94-725]. Indeed, Congress was concerned that, without the relief embodied in the 4-R Act, the Nation's privately owned railroads might not survive. S. 2718, 94th Cong., 1st Sess. § 101(a) (1976); see S. Rep. No. 94-499 at 2-8 (1975).

<sup>7</sup> The 4-R Act was followed by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, which provided the railroad industry significant additional relief from federal and state regulation. See *infra* at 2a.

<sup>8</sup> Various bills containing the substance of what became § 306 were considered over a span of more than a decade; the relevant legislative history thus includes committee reports and other materials predating the session of Congress during which the 4-R Act was passed. *Burlington Northern R.R. v. Lennen*, 715 F.2d 494, 497 (10th Cir. 1983), cert. denied, 467 U.S. 1230 (1984); *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860, 865 n.6 (9th Cir.), cert. denied, 464 U.S. 846 (1983).

Cong., 1st Sess. 3 (1969) [hereinafter S. Rep. No. 91-630]; accord *Transportation Act of 1972: Hearings Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 2d Sess., pt. 4 at 1244 (1972) (remarks of Rep. Adams). As a result of the discriminatory practices of many states, Congress ultimately estimated, "railroads [were being] over-taxed by at least \$50 million each year." H.R. Rep. No. 94-725 at 78 (1975). For an industry whose net operating income in 1972 was found to have been only \$835 million, *id.* at 80, this was a price the railroads—and the Nation—could no longer afford.

Section 306 was intended "to put an end to the widespread practice of treating for tax purposes the property of [railroads] on a different basis than other property in the same taxing district." S. Rep. No. 91-630 at 2 (1969). Subsection (1) declares that it is an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce for a state or political subdivision to:

- (a) assess railroad property at a value that bears a higher ratio to the true market value of such property than the ratio that the assessed value of all other commercial and industrial property bears to the true market value of such property (but only to the extent of the excess);
- (b) levy or collect any tax based on such an assessment;
- (c) levy or collect any ad valorem tax on railroad property at a higher rate than the rate generally applicable to other commercial and industrial property; or
- (d) impose any other tax that results in discriminatory treatment of a railroad carrier.

In adopting this antidiscrimination policy, Congress attacked the root cause of excessive state taxation of rail-



roads—their lack of local political representation—by tying the railroads' fate to that of other taxpayers.<sup>9</sup>

Because Congress was dissatisfied with the remedies available in state courts, it granted the federal courts jurisdiction over claims of state tax discrimination against railroad property, without regard to the amount in controversy or the citizenship of the parties and notwithstanding the Tax Injunction Act, 28 U.S.C. § 1341 (1982). Section 306(2) empowered the federal courts to “grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of . . . section [306].”

To protect the legitimate interests of the states, Congress placed four specific restrictions on the exercise of this new federal jurisdiction. First, “no relief may be granted . . . unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property.” § 306(2)(c). Second, the “burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law.” § 306(2)(d). Third, for determining the relationship between assessed value and the true market value of non-railroad property, a

<sup>9</sup> Since 1976, Congress has enacted substantially similar measures to protect motor carriers of property, Motor Carrier Act of 1980, Pub. L. No. 96-296, § 31, 94 Stat. 793, 823 (codified at 49 U.S.C. § 11503a (1982)); interstate bus lines, Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 20, 96 Stat. 1102, 1122 (codified at 49 U.S.C. § 11503a (1982)); and airlines, Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, tit. 5, § 532, 96 Stat. 671, 701 (codified at 49 U.S.C. app. § 1513(d) (1982)). The airline statute, unlike the others, does not provide federal court jurisdiction for discrimination claims. A case involving an unrelated issue under the airline counterpart of § 306 is presently before the Court in *Western Airlines v. Board of Equalization*, No. 85-732.

particular sampling method is prescribed. § 306(2)(e). Lastly, in order to enable the states to bring their taxation practices into compliance, Congress granted a grace period of three years before section 306 went into effect. § 306(2)(b).

State responses to section 306 have varied. In some instances, significant reforms have been instituted. In a number of cases, however, state and local taxing authorities have not responded appropriately but instead have attempted to perpetuate past discrimination through a number of devices.<sup>10</sup>

<sup>10</sup> See, e.g., *General American Transportation Corp. v. Kentucky*, 791 F.2d 38 (6th Cir. 1986) (railroad cars classified as public utility property and taxed at a higher rate of assessed value than other personal property); *Burlington Northern R.R. v. Bair*, 766 F.2d 1222, 1224-25 (8th Cir. 1985) (Iowa: taxation of railroad personal property without benefit of rollbacks and credits accorded to other personal property; overvaluation and undervaluation claims remanded for further findings of fact); *Louisville & N. R.R. v. Department of Revenue*, 736 F.2d 1495 (11th Cir. 1984) (Florida: tax benefit accorded to owners of other commercial and industrial property, but not to railroads); *Atchison, T. & S.F. Ry. v. Lennen*, 732 F.2d 1495, 1499 (10th Cir. 1984) (Kansas: railroad real property assessed annually, while other commercial and industrial real property assessed less frequently; remanded in part for further proceedings); *Clinchfield R.R. v. Lynch*, 700 F.2d 126, 130 (4th Cir. 1983) (North Carolina: railroad property assessed yearly to keep pace with inflation, while other real property reappraised and reassessed only every eight years); *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860 (9th Cir.) (California: additional lump-sum tax on railroad property remanded for findings concerning discrimination), *cert. denied*, 464 U.S. 846 (1983); *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981) (Alabama: license tax on railroads remanded for findings regarding discrimination); *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981) (North Dakota: taxation of railroad personal property but not other commercial personal property, and discriminatory assessment of railroad property); *Atchison, T. & S.F. Ry. v. Arizona*, 559 F. Supp. 1237 (D. Ariz. 1983) (improper classification of “other” commercial and industrial property relative to railroad property); *Louisville & N. R.R. v. Louisiana Tax Commission*, 498 F. Supp. 418 (M.D. La. 1980) (railroad property classified as “public service” property and



Tax discrimination is most obvious when a state applies different tax rates or different assessment ratios to railroad and non-railroad property.<sup>11</sup> Beyond this facial discrimination, unequal treatment can arise in at least two other ways. First, non-railroad property may be valued at *less than* its true market value (yielding "undervaluation"). Second, railroad property may be valued *in excess of* its true market value (yielding "overvaluation").<sup>12</sup> In either event, the practical result is a higher ratio of assessed value to true market value for railroad property than for non-railroad property. The issue in this case is whether and to what extent section 306 reaches claims of discrimination resulting from overvaluation of railroad property.

### 3. The Proceedings Below

Oklahoma's property taxation of railroads is based on an assessment made in the first instance by the Oklahoma Tax Commission (the "Tax Commission"), and submitted for approval by the State Board of Equalization (the "Board"). Okla. Stat. Ann. tit. 68, §§ 2443, 2454 (West 1966 & Supp. 1985). The assessment process involves several steps. The Tax Commission first estimates the full system value of the railroad's operating property both within and outside the State. Complaint ¶ 14, Pet. App. 26a-27a. This estimate is based on a weighted formula

assessed at 25% of true market value, while "other" property assessed at 15% of value).

<sup>11</sup> Some measure of market value is the standard for valuation in all states where a property tax is imposed, but in most states the tax is applied to a percentage of market value rather than to full market value. That percentage is referred to as the "assessment percentage" or "assessment ratio," and the resulting taxable portion of full market value is termed the "assessed value" of the property. See S. Rep. No. 1483, 90th Cong., 2d Sess. 22-24 (1968) [hereinafter S. Rep. No. 90-1483].

<sup>12</sup> The decision below referred to challenges to this second form of discrimination as "valuation" claims. Pet. App. 2a. See *infra* note 18.

that considers historical costs of assets and capitalized net operating income. Response of Defendant Oklahoma Tax Commission to Complaint for Injunctive and Declaratory Relief, ¶ 14, Joint Appendix (J.A.) 16. The Tax Commission next allocates a portion of the railroad's full system value to the State, and then multiplies an assessment ratio or percentage against the allocated system value to arrive at the Oklahoma assessed value. Complaint ¶ 14, Pet. App. 26a-27a.<sup>13</sup> It is this assessed value that is distributed to the various Oklahoma counties in which the railroad operates, for application of the local tax rate.

For 1981, Oklahoma determined Burlington Northern's full system value to be \$2.1 billion, of which 3.75% was allocated to the State. A 19% assessment ratio was applied to Burlington Northern's Oklahoma property, yielding a \$15 million assessed value. Complaint ¶ 25, Pet. App. 29a-30a. A 1981 State study revealed, however, that other commercial and industrial property was assessed at only 10.87%. Complaint ¶ 27, Pet. App. 30a. The study thus established that the taxing authorities could not, consistent with section 306, continue applying the discriminatory 19% ratio to Burlington Northern.

For 1982, the tax year at issue in the present case, Oklahoma applied the same 10.87% assessment ratio to Burlington Northern's property that it used for other commercial and industrial property.<sup>14</sup> Simultaneously, however, the taxing authorities increased their valuation

<sup>13</sup> This Oklahoma process is similar to that of most other states. Almost all states that apply a property tax to railroads do so on the basis of allocated full system value, using such factors as capitalized income, stock and debt values, and historical costs. See generally J. Runke & A. Finder, *State Taxation of Railroads and Tax Relief Programs* 23-32 (1977). In enacting § 306, Congress was aware that most states valued railroad property by this method. See S. Rep. No. 91-630 at 25 (1969); S. Rep. No. 90-1483 at 22 (1968).

<sup>14</sup> The 10.87% ratio for 1982 is not in controversy. Nor is the factor for allocation of full system value to Oklahoma in dispute.

of Burlington Northern's full system by 67%, from \$2.1 billion to \$3.5 billion. As a result, the ultimate 1982 assessment of petitioner's Oklahoma property was more than 90% of the 1981 assessment: \$13.7 million versus \$15 million. Complaint ¶¶ 25, 28, Pet. App. 29a-30a, 32a. The discriminatory result achieved in 1981 by the facially invalid use of a higher assessment percentage<sup>15</sup> was thus replicated in 1982 through the device of overvaluation. Complaint ¶ 36, Pet. App. 32a.

Following a timely protest of its 1982 property assessment,<sup>16</sup> Burlington Northern filed the present action in the District Court on March 3, 1983. The complaint contended that Oklahoma had violated section 306 by assessing the railroad's property for tax year 1982 at a ratio of assessed value to actual true market value much higher than the comparable ratio for other commercial and industrial property.<sup>17</sup> On March 25, 1983, respond-

<sup>15</sup> Significantly, the District Court ultimately found that respondents had "violated § 11503 in years prior to 1982." Pet. App. 16a.

<sup>16</sup> See Complaint ¶¶ 31, 33, Pet. App. 31a. That state administrative protest remains pending.

<sup>17</sup> The following chart, using the figures taken from the Complaint, ¶¶ 25-40, Pet. App. 29a-32a, shows Oklahoma's steps in arriving at assessments of Burlington Northern for 1981 and 1982, together with what Burlington Northern contends its 1982 property assessment should have been if calculated on a non-discriminatory basis under § 306.

	Oklahoma: 1981	Oklahoma: 1982	BN: 1982
Full system value	\$2,107,321,200	\$3,574,921,544	\$1,495,253,000
Allocation to State	x 3.75%	x 3.53%	x 3.53%
= Allocated			
system value	\$79,024,545	\$126,194,733	\$52,782,430
Assessment ratio	x 19%	x 10.87%	x 10.87%
= Assessed value	\$15,014,650	\$13,717,367	\$5,737,450

Thus, the Complaint alleged that the ratio of assessed value to correct true market value for Burlington Northern's railroad prop-

ents moved to dismiss for want of subject matter jurisdiction and for failure to state a claim. On August 25, 1983, while those motions were pending, the Court of Appeals issued its decision in *Burlington Northern R.R. v. Lennen*, 715 F.2d 494 (10th Cir. 1983), cert. denied, 467 U.S. 1230 (1984). In *Lennen*, the Tenth Circuit held that section 306 was not intended to provide relief from de facto discrimination resulting from overvaluation of railroad property.<sup>18</sup> Although the court framed this rule categorically, it carved out a narrow exception permitting a railroad to challenge the state's determination of "true market value" if it could make a "strong showing" of "purposeful overvaluation . . . with discriminatory intent." *Id.* at 498.

Despite its disagreement with *Lennen*, Burlington Northern sought and obtained leave from the District Court to amend its complaint to include a more explicit allegation of discriminatory intent. Pet. App. 40a-41a. On March 1, 1984, Burlington Northern submitted a supplementary brief and statement of facts, together with affidavits, in opposition to respondents' motions to dismiss. J.A. 59.<sup>19</sup> On January 8, 1985, without further

erty in 1982 was approximately 26% (assessed value of \$13,717,367 divided by the correct allocated system value of \$52,782,430), in contrast to the 10.87% assessment ratio for other commercial and industrial property. Complaint ¶ 40, Pet. App. 32a. The difference between 26% and 10.87% clearly exceeds the statutory 5% threshold for § 306 relief.

<sup>18</sup> The Tenth Circuit conceded that § 306 does encompass relief from de facto discrimination resulting from undervaluation of non-railroad property, which it characterized as "equalization relief," but distinguished discrimination by overvaluation as "valuation relief." 715 F.2d at 497-98. The terms "equalization" and "valuation," as used by the Tenth Circuit, are not drawn from the language of § 306. The origin and precise meaning of these terms are unclear.

<sup>19</sup> Petitioner specifically stated that it was submitting its statement of facts and affidavits solely for the purpose of demonstrating



proceedings, the District Court granted respondents' motion to dismiss for want of subject matter jurisdiction. The court found that there was "a legitimate valuation dispute between the parties." Pet. App. 16a. Rejecting petitioner's demand for an evidentiary hearing, however, the court ruled that "there must be a strong showing of intentional discrimination whether the facts supporting the showing are disputed or not." Pet. App. 12a. Applying that standard, the court resolved a number of disputed factual issues in favor of the taxing authorities, relying solely on the conflicting affidavits of the parties.<sup>20</sup> Based on those findings, the District Court held that Burlington Northern had failed to present the requisite "strong showing" of purposeful overvaluation with discriminatory intent as to its 1982 Oklahoma property tax. Pet. App. 15a-16a.<sup>21</sup>

the existence of a genuine issue of material fact regarding intent. J.A. 67-68. Burlington Northern requested that, if the District Court intended to decide any factual issues regarding jurisdiction, a full evidentiary hearing be held.

<sup>20</sup> In particular, the court rejected a key link in the chain of evidence showing discriminatory intent. Burlington Northern contended in its complaint and brief opposing the motion to dismiss that the taxing authorities had discriminatorily increased its system valuation from a 1981 level of \$2.1 billion to a 1982 level of more than \$3.5 billion solely to overcome the drop in the allowed assessment percentage from 19% to 10.87%. Complaint ¶¶ 25, 28, 36, Pet. App. 29a, 30a, 32a; J.A. 79-85. The District Court, however, accepted respondents' contention that the State's 1981 system value determination was actually higher than \$3.5 billion, and thus that there was "nothing to indicate that system values were intentionally inflated to compensate for the reduced assessment ratio." Pet. App. 15a.

<sup>21</sup> When the District Court dismissed Burlington Northern's 1982 property tax case, it also dismissed the railroad's separate action with respect to its 1983 taxes. Pet. App. 17a. By order of April 29, 1985, however, the court reinstated Burlington Northern's 1983 claim. J.A. 125. The 1983 case has not yet been decided, and is not before this Court.

Burlington Northern appealed to the Tenth Circuit, and requested *en banc* review for the purpose of overruling *Lennen*. The United States and the Association of American Railroads filed briefs *amicus curiae* in support of that request. After the full Tenth Circuit denied the request for *en banc* consideration, the panel below affirmed the District Court's dismissal of the case. The court specifically ruled that the District Court could dismiss a section 306 complaint alleging discrimination resulting from overvaluation—without an evidentiary hearing of any kind—if it found the plaintiff's pretrial "showing" of discriminatory intent inadequate. Pet. App. 3a. Indeed, the Tenth Circuit panel effectively raised the jurisdictional intent threshold even above that of *Lennen* by requiring a showing of either facially discriminatory procedures or "state officials' remarks regarding an intent to discriminate in valuation." Pet. App. 3a-4a.

### SUMMARY OF ARGUMENT

I. In the 4-R Act, Congress exercised its plenary authority under the Commerce Clause to prohibit all forms of state tax discrimination against railroads. Recognizing the crucial role played by property valuation and assessment in the state taxation process, Congress required states to equalize the ratios of assessed value to true market value for railroad property and all other commercial and industrial property. § 306(1)(a). Congress also specifically prohibited tax rate discrimination and adopted a catchall provision barring any other tax that results in discriminatory treatment of a railroad. § 306(1)(c), (d). Mindful of the historic inability or unwillingness of state agencies and courts to redress these abuses, Congress gave the federal courts jurisdiction to enforce section 306.

In the face of this clear statutory mandate, the Tenth Circuit ruled that the federal courts have no jurisdiction to hear claims of state tax discrimination resulting



from railroad property overvaluation, absent a showing of overt discriminatory intent. The effect of the Tenth Circuit's rule is essentially to make a state's determination of a railroad's true market value conclusive in federal court.

The statute itself refutes the Tenth Circuit's position. By its terms, section 306 authorizes federal courts to determine the proper assessed value and true market value of both railroad and non-railroad property, as a means of testing whether railroad property is being subjected to a disproportionate tax burden. § 306(1)(a). Nowhere does the statute indicate that the issue of the true market value of the railroad's property is to be treated any differently than other factual issues in a section 306 case. Indeed, the statute expressly provides that, in determining the true market value issue, the federal court must apply the burden of proof specified by state law. § 306(2)(d). Plainly, this explicit allocation of the burden of proof would have been unnecessary if true market value were not intended to be an issue in actions under section 306.

Nor did Congress require any showing of discriminatory purpose or intent. To the contrary, the statute speaks solely in terms of objective results. Indeed, as its chosen threshold for federal relief, Congress enacted an objective, five-percent discrepancy factor in the comparison of assessment-to-valuation ratios. § 306(2)(c).

By condoning a highly effective technique for state tax discrimination against railroads, the Tenth Circuit's interpretation of section 306 would defeat Congress' express purpose in enacting that law. Given the remedial objectives of section 306 and the clear mandate of its language, there is no support for reading into the statute an exception that would inevitably swallow the rule.

II. Where, as here, the language of the statute is unambiguous, resort to legislative history is unnecessary.

Yet if that record is examined, it emphatically confirms that Congress intended to provide federal court jurisdiction to hear section 306 claims involving railroad property overvaluation. Nothing suggests the necessity of proving discriminatory purpose or intent, either for section 306 claims generally or for overvaluation claims in particular. Indeed, Congress' model for this statute, former section 13(4) of the Interstate Commerce Act, was consistently interpreted to measure "discrimination" by reference to the objective economic impact of a state's actions rather than their purpose or intent.

III. Contrary to the premises of the Tenth Circuit, sound principles of federalism do not require any extra-statutory restriction on the scope of section 306. In exercising its powers under the Commerce Clause, Congress made important policy judgments balancing federal and state interests that should not be second-guessed. See *Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 14 & n.10 (1983). Section 306, with its built-in restrictions on federal relief, preserves the states' authority to levy property taxes and to experiment in their methods of doing so—provided they do not discriminate against interstate railroads.

Nor is concern about the burden on federal courts an appropriate reason to narrow the reach of the statute's remedial provisions. Experience to date offers no support for contending that federal courts will be swamped by a flood of railroad tax cases, or that they lack competence to decide these issues. Moreover, inferring additional restrictions on federal court jurisdiction would be inconsistent with Congress' intent to supplement existing state remedies it found inadequate. Congress chose this statute as the most efficient judicial remedy for a substantial national ill, and that judgment should be respected.

## ARGUMENT

### I. THE PLAIN LANGUAGE OF SECTION 306 PROHIBITS STATE TAX DISCRIMINATION RESULTING FROM OVERVALUATION OF RAILROAD PROPERTY, WITHOUT REGARD TO INTENT

#### A. Section 306 Reaches All Forms of Discrimination, Including That Resulting From Railroad Property Overvaluation

Under the Commerce Clause, U.S. Const., art. I, § 8, cl. 3, Congress has plenary authority to regulate interstate commerce, including authority to preempt or restrict state taxation of property engaged in interstate commerce. *E.g.*, *Aloha Airlines*, 464 U.S. at 12-14; *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979). Congress studied state property taxation of interstate railroads for over fifteen years, and concluded that discriminatory taxation was unduly burdensome and a serious threat to the railroads' financial survival. Having identified an evil of substantial duration, scope, and magnitude, Congress wrote a statute addressing the problem in its entirety. The plain language employed by Congress to eliminate state tax discrimination is fully adequate to resolve the issues presented in this case. *E.g.*, *Randall v. Loftsgaarden*, 106 S. St. 3143, 3150 (1986) (plain language controlling); *Aloha Airlines*, 464 U.S. at 11-12 (same).

Subsection (1)(a) of the statute prohibits discriminatory "assessment" of railroad property.<sup>23</sup> Giving practical definition to what constitutes a discriminatory assessment, the statute expressly provides that the ratio produced by the following calculation—

$$\frac{\text{assessed value of railroad property}}{\text{true market value of railroad property}}$$

<sup>23</sup> "[A]ssessment" means valuation for purposes of a property tax levied by any taxing district . . . § 306(3)(a).

must not exceed the ratio produced by a second calculation—

$$\frac{\text{assessed value of commercial and industrial property}}{\text{true market value of commercial and industrial property.}}$$

This statutory formula necessarily requires the district court to determine the correct figures for both the numerator and denominator of each of the ratios. Nothing in the statute suggests that a district court lacks authority to decide any factual controversies regarding those numbers.

The statute's structure tracks the practical realities of state taxation of railroad property. In Oklahoma, as in most states, that process starts with a determination of the railroad's full system value across all states in which it operates. *See supra* at 8-9. Section 306 recognizes that discriminatory taxation of railroad property can arise not only from tax rates, but also from disproportionate valuation or assessment.

Further, subsection (1)(d), which was not even addressed by the courts below, prohibits "any other tax which results in discriminatory treatment" (emphasis added). In this broad catchall provision, Congress recognized the possibility of other methods of tax discrimination—possibly unimagined or subtler than those previously enumerated—and prohibited those other abuses as well. Whether or not a particular form of discrimination is specifically described, it is unlawful.

Notwithstanding the statute's clear and broad language, the Tenth Circuit held that a federal court may not hear claims of discrimination arising from railroad property overvaluation (at least absent manifest intent to discriminate) because the court may not determine the "true market value" of railroad property in order to decide whether discrimination has occurred. Pet. App. 2a; *Lennen*, 715 F.2d at 497. In effect, the Court of Appeals ruled that the "true market value" of railroad property—



the starting point for the entire taxation process—is whatever the state authorities say it is. In reaching this conclusion, the Tenth Circuit ignored most of the actual text of section 306 and misread the rest.

In ordinary usage, the term “true market value” denotes objective accuracy.<sup>23</sup> Notably, where the term is used elsewhere in the statute, it is to provide that “the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law.” § 306(2)(d). If the “true market value” of railroad property were not an issue to be determined independently by the federal court, there would have been no reason for Congress to prescribe a burden of proof. Moreover, subsection 306(2)(d) establishes precisely the degree of deference due the state tax system, and stops well short of making the state’s determination of value conclusive. Thus, the statute by its own terms authorizes federal court fact finding as to true market value, rather than blind acceptance of state calculations.<sup>24</sup>

The only textual basis for the Tenth Circuit’s restricted statutory interpretation was its reading of subsection (2)(e). *Lennen*, 715 F.2d at 497. That provision sets forth two methods, including a sampling approach known as the “sales assessment ratio study,” for determining the ratio of assessed value to true market value for non-railroad commercial and industrial property. The Court of Appeals reasoned that because Congress set forth a methodology for determining the true market value of commercial and industrial property but not railroad prop-

<sup>23</sup> Unless otherwise defined, the words in a statute must be given their ordinary meaning. See *United States v. James*, 106 S. Ct. 3116, 3121 (1986) (citations omitted).

<sup>24</sup> The legislative history of § 306 confirms the statute’s plain language on this point. See *infra* at 23-26.

erty, Congress did not intend the true market value of railroad property to be an issue at all. *Id.*<sup>25</sup>

This reasoning is fallacious. The task of determining assessed and true market values for the entire class of all non-railroad commercial and industrial property is a formidable one: a statistical sampling methodology was prescribed merely in order to make the task manageable. There was no need for Congress to prescribe a comparable methodology for railroad property, since nearly all states employ the allocated full system value method for valuing railroads. See *supra* note 13. Moreover, subsection (2)(e) is one in a series of *provisos* to the exercise of federal jurisdiction in section 306 cases. The absence of a proviso concerning proof of the true market value of railroad property—far from precluding that determination by federal courts—implies only that those courts should determine the value of railroad property as they normally resolve other factual issues.

The decision below directly undermines Congress’ express objective of eliminating discriminatory state taxation of railroads. In effect, the Tenth Circuit has drawn a blueprint for discriminating against railroad property without triggering federal court review.<sup>26</sup> Overvaluation is an obvious way to discriminate against railroad property, and it is unthinkable that Congress would have left such a gaping hole in the statutory scheme without some express language to that effect.<sup>27</sup> In the absence of statu-

<sup>25</sup> This mode of statutory analysis, commonly described by the phrase *expressio unius est exclusio alterius*, has been sharply criticized by this Court. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983).

<sup>26</sup> Moreover, the decision below potentially undercuts the protection Congress gave to other modes of transportation through statutes modeled on § 306. See *supra* note 9.

<sup>27</sup> Although bound by the *Lennen* rule, a district court in the Tenth Circuit recently observed that, “[a]s long as its figures can escape review, a state can discriminate more effectively against a



tory language precluding any challenge to a state's valuation of railroad property, this Court should not attribute to Congress a futile act. See *United States v. Bisceglia*, 420 U.S. 141, 150 (1975).<sup>28</sup>

#### B. Section 306 Contains No Requirement of Discriminatory Intent

Not one word of section 306 suggests that a railroad must show an official purpose or intent to discriminate.<sup>29</sup> The statute takes a practical economic approach to defining discrimination, rather than looking to the subjective motivation or intent of state administrators. The text of section 306 speaks not of intent, but of "action[s]" constituting discrimination against interstate commerce, and of "prohibited acts." § 306(1). Moreover, subsection (1)(d) specifically prohibits "[t]he imposition of any other tax which results in discriminatory treatment" of a railroad, plainly looking to impact rather than purpose.<sup>30</sup>

\_\_\_\_\_ railroad by overvaluing it than it can by assessing it at a higher rate." *Union Pacific R.R. v. State Tax Commission*, 635 F. Supp. 1060, 1068 (D. Utah 1986). There is significant evidence that Wyoming, another state within the Tenth Circuit, has already picked up the cue from the Court of Appeals: Burlington Northern's assessed valuation for its Wyoming property more than doubled from 1985 to 1986. Pet. App. 81a, 83a.

<sup>28</sup> Respondents contend that, if construed to permit claims of railroad property overvaluation, § 306 would run afoul of this Court's decision in *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961). Respondent's Brief in Opposition to Petition for Writ of Certiorari at 7-8. However, § 306 explicitly invalidates only the *excessive* portion of a discriminatory tax. When a federal court applies this specific congressional standard, *Moses Lake Homes*, which dealt with a tax held to be invalid in its entirety, 365 U.S. at 751-52, is inapposite.

<sup>29</sup> Nor does any intent requirement appear in the Tax Injunction Act, 28 U.S.C. § 1341, upon which the Tenth Circuit relied in support of its restricted reading of § 306. *Lennen*, 715 F.2d at 498.

<sup>30</sup> Notably, those federal courts of appeals outside the Tenth Circuit that have found it necessary to consider whether § 306 re-

The Tenth Circuit's intent standard appears to be premised upon its belief that, as a matter of policy, some limit should be placed on the power of the federal courts to review state valuation decisions. This led the Court of Appeals to adopt a threshold test designed to exclude overvaluation claims in virtually all cases. In section 306, however, Congress established a significant, but not insurmountable, threshold test of its own. Before federal relief can be triggered, subsection 306(2)(c) requires at least a five percent discrepancy between the state's assessment ratios for railroad property and other property. The court below thus substituted its own policy judgment for that of Congress, superimposing upon an objective and workable statutory standard another that lacks any foundation whatsoever.<sup>31</sup>

\_\_\_\_\_quires a showing of intent have been unanimous in concluding that it does not. *Atchison, T. & S.F. Ry. v. Board of Equalization*, 795 F.2d 1442, 1446-47 (9th Cir. 1986), petition for rehearing pending on other grounds; *General American Transportation Corp. v. Kentucky*, 791 F.2d 38, 42 (6th Cir. 1986); *Burlington Northern R.R. v. Bair*, 766 F.2d 1222, 1226 (8th Cir. 1985); *Louisville & N. R.R. v. Department of Revenue*, 736 F.2d 1495, 1498 (11th Cir. 1984).

<sup>31</sup> In addition to imposing a rule requiring a threshold showing of intent, the courts below applied that rule in a manner that effectively deprived petitioner of any opportunity to make the intent showing. In granting respondents' motion to dismiss, the District Court erroneously treated "discriminatory intent" as a jurisdictional issue, rather than at most an element of the claim for relief. See Fed. R. Civ. P. 12(b)(1), (6); *Bell v. Hood*, 327 U.S. 678, 682-83 (1946). Even if intent were a "jurisdictional" matter, it was one so intertwined with the merits of the case that it was improper to dismiss the claim prior to a trial on the merits. *Id.* at 682-85. In the face of material issues of fact as to overvaluation and intent, see *supra* notes 17, 20, the District Court clearly erred in granting the motion to dismiss without an evidentiary hearing. See *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977).

## II. THE LEGISLATIVE HISTORY OF SECTION 306 CONFIRMS THAT THE STATUTE ENCOMPASSES RAILROAD PROPERTY OVERVALUATION

Confronted with a clear prohibition against all discriminatory state taxation, the Tenth Circuit turned to legislative history to support its constricted reading of the statute. Given the clarity of section 306, resort to legislative history was almost certainly unnecessary. *See, e.g., Aloha Airlines*, 464 U.S. at 12 (no need to review legislative history when the plain language of the statute forbids a state tax on interstate commerce); *Ex parte Collett*, 337 U.S. 55, 61 (1949). In any event, the legislative record overwhelmingly confirms that section 306 encompasses discrimination against railroads resulting from overvaluation of their property. There is no evidence that Congress consciously chose to exclude overvaluation claims from the scope of section 306, or meant to limit such relief to cases of purposeful overvaluation with discriminatory intent.

### A. The Legislative History Demonstrates That Congress Expected Railroad Property Valuation To Be Determined by the Federal Courts in Section 306 Cases

The reports and hearings on the bills that preceded section 306 demonstrate that relief from discriminatory state overvaluation of railroad property was an integral part of the solution Congress enacted. At the very outset of the legislative effort to eliminate discriminatory state taxation of railroads, the landmark Doyle Report detailed the harm caused to railroads by discriminatory state valuation practices. Doyle Report at 452-59.<sup>32</sup> The Report's findings, echoed over the years as grounds for

<sup>32</sup> The Report recognized, for instance, that: (1) actual state assessment practices, even where state law mandates a pre-established assessment ratio, frequently result in inequitable treatment of railroads, *id.* at 454; (2) "the concept of value" is funda-

section 306,<sup>33</sup> thoroughly refute any notion that Congress overlooked valuation issues, or meant to defer to the states with respect to those issues.

Seven years after the Doyle Report, following hearings on a direct predecessor of section 306, a Senate Committee concluded that the proposed legislation "is needed, is appropriate, and *adequate to accomplish the intended purpose of eliminating discriminatory taxation.*" S. Rep. No. 90-1483 at 8 (1968) (emphasis added). Clearly, Congress did not intend to leave untouched such an obvious method of discrimination as overvaluing railroad property. Indeed, a dissenting Senator attached a statement to that report objecting to the breadth of the bill, and making its meaning even clearer: "Under S. 927, *a Federal court will necessarily be required to review State valuation principles and procedures* in order to determine whether carrier operating property is assessed at a percentage of true market value that is higher than the assessment percentage of all other property." *Id.* at 26 (remarks of Sen. Lausche) (emphasis added).

Twice during the legislative process, the Interstate Commerce Commission, the federal agency most directly concerned with railroad issues, manifested its own understanding that the proposed prohibition of state tax discrimination encompassed issues of true market value:

It appears that H.R. 4972 is intended to shift the final determination of "true market value" of carrier

mental to property taxation, and differences over values lead to "creeping inequity" against railroads, *id.*; (3) states have used the historical cost method of valuation of railroad property to "justify a higher full value which will in turn appear to produce a lower equalized assessment ratio," *id.* at 456-57; and (4) in the absence of legislated standards, courts have regrettably committed valuation issues to the discretion of state officials, *id.* at 458-59.

<sup>33</sup> The Doyle Report was cited frequently in later legislative history. *See, e.g.,* S. Rep. No. 91-630 at 5, 20 (1969); S. Rep. 90-1483 at 3-4 (1968); 113 Cong. Rec. 2909 (1967) (remarks of Sen. Magnuson).



property, as well as that of other property in a taxing district, from State courts to U.S. district courts.<sup>34</sup>

Along the same lines, the Bureau of the Budget observed that the legislative proposal would shift final determination of the true market value of railroad property "from state courts to U.S. district courts." *House Hearing of 1964* at 5 (letter of Phillip S. Hughes, Assistant Director for Legislative Reference). If Congress had meant "true market value" to be whatever number the state used as the departure point for taxation, without permitting an opportunity to prove true market value independently in federal court, it would have been easy enough to define the term accordingly. In fact, as early as 1969 an amendment was suggested by the State of Washington that would have done just that,<sup>35</sup> but despite seven more years of legislative consideration, no such amendment was ever adopted.

Against this authoritative legislative history confirming federal court jurisdiction with respect to overvaluation claims, respondents have seized upon isolated oral

<sup>34</sup> *Tax Assessments on Common Carrier Property: Hearings on H.R. 4972 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 3 (1966) [hereinafter *House Hearings of 1966*] (letter from Chairman John W. Bush); *accord Tax Assessments on Common Carrier Property: Hearing on H.R. 736, H.R. 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 2d Sess. 2 (1964) [hereinafter *House Hearing of 1964*] (letter from Chairman Abe McGregor Goff).

<sup>35</sup> *State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 98 (1969) [hereinafter *Senate Hearing of 1969*] (letter from George Kinnear, Director, State of Washington Dep't of Revenue); cf. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 220 (1983) (improper to adopt a statutory reading that Congress considered and rejected).

comments by two individuals from the private sector.<sup>36</sup> This is perhaps the least reliable form of legislative history, to be given virtually no weight.<sup>37</sup> In any event, those few ambiguous comments are outweighed by numerous explicit statements of responsible state officials that the contemplated legislation *would* authorize judicial determination of the true market value of railroad property.<sup>38</sup>

<sup>36</sup> The witness on whom respondents rely most heavily, Philip Lanier, was counsel to the Louisville & Nashville Railroad in the 1960's, and was one of the witnesses who appeared on behalf of the Association of American Railroads. Respondents' Brief in Opposition to Petition for Writ of Certiorari 6-7 & n.9. Respondents quote selectively from portions of Mr. Lanier's oral testimony, at most a fraction of the many days of hearings held on the proposed legislation over years of deliberation.

<sup>37</sup> See, e.g., *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493-94 (1931).

<sup>38</sup> See *Senate Hearing of 1969* at 98, 99 (letter from George Kinnear, Director, State of Washington Dep't of Revenue) (bill would require federal courts "to review and determine the correctness of . . . actual valuation results for carriers" and "to determine de novo the true market value of transportation property"); *id.* at 103, 104 (letter from Houston Flournoy, Controller, State of California) (bill would commit "entire review process" for railroad taxation to federal courts, involving them in "complex valuation problems"); *Discriminatory Taxation of Common Carriers: Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 110, 114 (1967) (prepared statement of Charles F. Conlon, Exec. Sec'y, NATA, appearing on behalf of 24 states) (to determine the actual assessment ratio, the federal court must first "decide whether property has been correctly valued"); *id.* at 122 (letter from Mills E. Godwin, Jr., Governor of Virginia) (bill would require district courts to establish "true market values" for both common carrier transportation property and all other property); *id.* at 128 (prepared statement of Fred O. (Bud) Dickinson, Jr., Comptroller, State of Florida) (bill would necessarily require "federal courts to review the valuation of carrier property"); *House Hearings of 1966* at 91, 92 (statement of Earl Berry, Director, Tax Division, Arkansas Public Service Comm'n) (federal courts will determine fair market value); *id.* at 122, 123 (statement of George J. Dworak,



There is no suggestion that Congress diluted the impact of the proposed legislation at any time between the reports and hearings of the late 1960's and the ultimate enactment of section 306. To the contrary, the bills that led to enactment were *strengthened* by addition of the catchall prohibition against all other forms of discrimination, well after the comments upon which respondents seek to rely.<sup>39</sup> In addition, the provision prescribing a burden of proof for determining true market value was added late in the legislative process, reaffirming Congress' recognition that true market value would be a factual issue in section 306 cases. See S. Rep. 94-499 at 65 (1975); accord S. Conf. Rep. No. 94-595 at 166 (1976).

This extensive record of congressional understanding that the valuation of railroad property would be an issue is capped by an express statement in the final House report prior to passage of the 4-R Act:

Nebraska State Tax Commissioner) (state courts more experienced than federal courts in determining necessary valuations); *id.* at 142, 143 (letter from Alan Cranston, Controller, State of California) (bill would redirect "whole review process" for railroad taxation, including valuation determinations for railroad property, into federal courts); see also *Senate Hearing of 1969* at 59 (statement of Broley E. Travis, Consulting Valuation Engineer, testifying in favor of the proposed legislation).

<sup>39</sup> The catchall provision first appeared in H.R. 12891, introduced February 19, 1974, 93d Cong., 2d Sess., and was part of the bill (S. 1149 as amended) passed by the House in December of that year. The expansive scope of the catchall provision was described in the Conference Report. See S. Conf. Rep. No. 595, 94th Cong., 2d Sess. 166 (1976) [hereinafter S. Conf. Rep. No. 94-595]. See also *Burlington Northern R.R. v. Bair*, 766 F.2d 1222, 1224 (8th Cir. 1985); *Richmond, F. & P. R.R. v. Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985); *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036, 1040-41 (11th Cir. 1981); *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 209-10 (8th Cir.), cert. denied, 454 U.S. 1086 (1981).

This section [section 306] amends Part I of the Interstate Commerce Act to include a new section which would make unlawful discriminatory ad valorem state or state subdivision taxation activities. Such tax practices include: (1) *overvaluation* . . . .

H.R. Rep. No. 94-725 at 113 (1975) (emphasis added).<sup>40</sup> The Tenth Circuit's effort to exclude virtually all overvaluation claims from the ambit of section 306 is thus contrary to Congress' express goals and expectations, creating a loophole that threatens to destroy the entire remedial scheme.<sup>41</sup>

#### B. The Legislative History Contains No Suggestion of an Intent Standard

There is no legislative history to support a requirement under section 306 of purpose or intent to discriminate. Indeed, both the statute and its legislative history are

<sup>40</sup> Although the Senate version of the bill was ultimately adopted in conference, S. Conf. Rep. No. 94-595 at 166 (1976), the relevant language of the House bill is essentially identical to the Senate bill, and there is no indication in any of the reports that the Conference Committee differed with the House's interpretation of that language.

<sup>41</sup> By barring railroad property overvaluation claims from the federal courts, the Tenth Circuit's ruling undermines § 306 in another way. The legislative history clearly demonstrates that Congress meant to ensure railroads an effective central forum for determination of all claims of discriminatory state taxation practices. H.R. Rep. No. 94-725 at 77 (1975). In some instances, because of the decentralized nature of property tax collection, a railroad was previously required to bring suit in dozens of local courts or agencies; in other instances, railroads suffered the disadvantage of not being able to enjoin the discriminatory tax while its validity was being determined. *Id.* Moreover, the relief available in state court was often less effective than § 306 relief because many state courts reviewed assessment decisions under very lenient standards. By providing a central federal forum, Congress intended to streamline the remedial system for the railroads and avoid costly and repetitive litigation over these issues.

inconsistent with the use of a subjective test for determining the existence of prohibited discrimination.

First, the many reports and other sources of legislative history focus on bottom-line fiscal and financial results.<sup>42</sup> Congress' overriding concern was with the revenue losses imposed on railroads by discriminatory state taxation. S. Rep. No. 91-630 at 9 (1969). A state tax that discriminates against railroads will have that adverse revenue effect regardless of the intent of the taxing authorities.

Second, Committee reports on close predecessors of section 306 stated that "[p]recedent" for the bill's definition and prohibition of "unjust discrimination" against interstate commerce was to be found in former section 13(4) of the Interstate Commerce Act. S. Rep. No. 91-630 at 9 (1969); S. Rep. No. 90-1483 at 9 (1968). Section 13(4) empowered the Interstate Commerce Commission to set aside state-approved intrastate rates that discriminated against interstate commerce.<sup>43</sup> The reports on section 306 reasoned that, like burdensome state regulation of intrastate rates, discriminatory state property taxation siphons off the resources of interstate carriers. S. Rep. No. 91-630 at 9 (1969); S. Rep. No. 90-1483 at 9 (1968).

The intended parallel is significant because section 13(4) was never interpreted to require a showing of discriminatory intent. In proceedings under section 13(4) in which it was alleged that intrastate rates discriminated against interstate commerce, the focus of the Interstate Commerce Commission and reviewing courts in measuring such discrimination was consistently and exclusively upon economic analyses of differences between comparable in-

<sup>42</sup> E.g., S. Rep. No. 91-630 at 5 (1969); S. Rep. No. 90-1483 at 4 (1968); Doyle Report at 487 (1961).

<sup>43</sup> The Appendix to this Brief sets out § 13(4) as it existed at the time of the reports.

trastate and interstate rates and the costs and conditions of service covered by those rates.<sup>44</sup> By using section 13(4) as its model for section 306, Congress implicitly adopted the objective standard of section 13(4), and clearly did not contemplate a requirement that plaintiffs demonstrate discriminatory motives or intentions on the part of state officials.<sup>45</sup> In sum, the legislative history of the statute confirms that discriminatory impact resulting from overvaluation of railroad property is sufficient to justify federal judicial relief.

### III. THE TENTH CIRCUIT'S INTERPRETATION OF SECTION 306 UPSETS THE BALANCE CONGRESS STRUCK BETWEEN STATE TAXATION AND THE FEDERAL INTEREST IN PROTECTING INTERSTATE COMMERCE

As the Doyle Report recognized, this Court has frequently invoked the need for congressional guidance concerning state taxation of interstate commerce. Indeed, the Report drew upon Justice Frankfurter's observation that:

The solution to these problems [of state taxation of interstate commerce] ought not to rest on the self-

<sup>44</sup> E.g., *King v. United States*, 344 U.S. 254, 274 (1952) (jurisdiction under § 13(4) not limited to confiscatory intrastate rates; economic evidence of unjustified discrepancy between intrastate and interstate rates sufficient to support § 13(4) relief); *Illinois Commerce Commission v. United States*, 292 U.S. 474, 484 (1934) (upholding § 13(4) relief based on analysis of economic effects of intrastate switching rates); *Oklahoma Corp. Commission v. United States*, 388 F. Supp. 4 (N.D. Okla. 1974) (intrastate rates invalidated based on expert witness testimony); *Oklahoma Corp. Commission v. United States*, 235 F. Supp. 803 (W.D. Okla. 1964); see *Houston, E. & W. Tex. Ry. v. United States (The Shreveport Rate Case)*, 234 U.S. 342 (1914).

<sup>45</sup> Significantly, when called upon to construe statutes analogous to § 306 in their proscription of state taxation of interstate commerce, this Court has not required a showing of purpose or intent to burden interstate commerce. *Aloha Airlines*, 464 U.S. 7 (Airport Development Acceleration Act of 1973); *Arizona Public Service Co.*, 441 U.S. 141 (15 U.S.C. § 391).



serving determination of the States of what they are entitled to out of the Nation's resources. Congress alone can formulate policies founded upon economic realities . . . .

*Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 477 (1959) (Frankfurter, J., dissenting) (quoted in part in the Doyle Report at 473).<sup>48</sup> Problems of discrimination, misapportionment, and multiple burdens imposed by state taxation have long plagued our federal system. Until recently, Congress seldom chose to exercise its plenary power in this area, apparently preferring to leave problems to be resolved by state courts, with constitutional oversight by this Court.

In the 4-R Act, however, Congress deliberately concluded that federal action was necessary to address a specific national problem resulting from discriminatory state taxation—that affecting the railroad industry. Section 306 represents a carefully considered balancing of federal and state interests: it protects the railroads, and their vital contribution to interstate commerce, from discriminatory treatment, while preserving the powers of the states to continue nondiscriminatory taxation.

Recognizing the important policy goals of section 306, all federal courts of appeals save the one below have construed it in accordance with Congress' broad remedial intentions. The Eleventh Circuit, for instance, has observed that section 306 embodies "a general concern with discrimination in all of its guises." *Southern Ry. v. State Board of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (emphasis added); see *Eagerton*, 663 F.2d at 1040. The Fourth

<sup>48</sup> See also 358 U.S. at 457 (absence of congressional regulation leading to litigation); *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 188-89 (1940) (Black, J., dissenting) (articulating need for congressional control over state taxation of interstate commerce) (quoted in the Doyle Report at 473).

Circuit has found that the statute "clearly and unambiguously prohibits all forms of discriminatory taxation of railroads." *Richmond, F. & P. R.R. v. Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985). Similarly, the Eighth Circuit has held that section 306 prohibits state tax discrimination against railroads "in any form whatsoever." *Ogilvie v. State Board of Equalization*, 657 F.2d at 210; see *Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468, 472 & n.6 (8th Cir. 1983).

Apart from the Tenth Circuit, the courts of appeals have also agreed that discrimination resulting from overvaluation claims must fall within section 306. In *Burlington Northern R.R. v. Bair*, 766 F.2d 1222, 1226 (8th Cir. 1985), the court held that section 306 reaches claims of overvaluation or undervaluation without regard to intent or purpose. Otherwise, the Eighth Circuit reasoned, states would retain a free hand to discriminate against railroads by assessing excessive values, and the statute would become "a mere shadow" of what it was meant to be. *Id.* at 1225-26. To the same effect, the Ninth Circuit ruled unequivocally that "federal courts have jurisdiction over claims of rail property overvaluation," without any requirement that purpose or intent to discriminate be shown. *Atchison, T. & S.F. Ry.*, 795 F.2d at 1446. These decisions have served to preserve the integrity of section 306 as a major part of our national transportation policy.

The Tenth Circuit alone has restricted the substantive scope of the statute. That court was "unwilling to infer that [Congress] intended district courts to sit as state tax assessment boards for railroad property," based on its perception that federal court overvaluation determinations "would impose significant burdens on district courts and would substantially thwart the tax collection process of states." *Lennen*, 715 F.2d at 498; Pet. App. 2a. What this amounts to is second-guessing Congress on the critical policy choices it made in enacting section 306. A host of issues pertaining to federal-state rela-



tions were addressed in the legislative record before Congress rendered its considered judgment. If anyone is to reconsider that judgment, it must be Congress itself. See *Aloha Airlines*, 464 U.S. at 14 & n.10.

In any event, the Tenth Circuit's fears are based on a distorted view of what section 306 review of railroad property overvaluation actually involves, and of its impact on state tax collection. To be sure, calculation of the excessive and unlawful portion of the state tax will require, *inter alia*, a judicial determination of the true market value of railroad property. That determination, however, is unlikely to create any unusual difficulty for federal courts. In Oklahoma and almost all other states, valuations of railroad property are based on the allocated full system value method. That valuation method inquires into such system-wide financial matters as historical costs and capitalization of earnings, and judicial review ordinarily turns on expert testimony. No parcel-by-parcel valuation of properties is required, and no peculiarly local knowledge or special expertise is necessary. Accordingly, there is no reason to believe that federal courts are not competent to resolve valuation disputes in the course of deciding whether state taxes are discriminatory.<sup>47</sup> As to preserving the integrity of state and local functions, the determination of objective economic facts is certainly less intrusive than inquiring into state officials' thought processes for evidence of discriminatory purpose or intent.

Nor will tax discrimination claims involving railroad property overvaluation be likely to "overburden" the fed-

<sup>47</sup> Prior to the passage of § 306, the fair market value of railroad property arose on occasion as a constitutional issue before this Court. *E.g. Norfolk & W. Ry. v. Missouri State Tax Commission*, 390 U.S. 317 (1968). In addition, federal district courts routinely make determinations of fair market value in such fields as federal estate and gift tax, and fiduciary duties in stock transactions.

eral courts. Given the perennial failure of administrative boards and state courts to supply any adequate remedy for state tax discrimination against interstate commerce, section 306 represents a well-measured commitment of federal judicial resources.<sup>48</sup> In any event, in the nearly eight years since section 306 became effective, federal courts have issued reported decisions in only about thirty separate cases under the statute.<sup>49</sup> Of these, fewer than a dozen have involved claims of railroad property overvaluation.<sup>50</sup> Moreover, once states come to understand better the broad mandate of section 306, it is reasonable to expect that even the presently moderate level of litigation will subside.

On the other hand, should discrimination resulting from overvaluation of railroad property be held immune from federal review under section 306, the states will have been given a master plan for evading the statute. The likely result would be an explosion of state court litigation concerning railroad overvaluation. In view of the historic hostility of state courts to railroads with respect to state property taxes, this Court would once again be left as the last and only meaningful line of defense against a serious burden on interstate commerce.

<sup>48</sup> Moreover, by reducing the need for duplicative and extended state court proceedings, § 306 fosters overall judicial economy. See *supra* note 41.

<sup>49</sup> Many of these cases have been consolidated for trial or appeal.

<sup>50</sup> *Atchison, T. & S.F. Ry.*, 795 F.2d 1442; *Bair*, 766 F.2d 1222; *Southern Ry.*, 715 F.2d 522; *Lennen*, 715 F.2d 494; *Union Pacific R.R.*, 635 F. Supp. 1060; *Atchison, T. & S.F. Ry. v. Arizona*, 559 F. Supp. 1237 (D. Ariz. 1983). Reprinted in the Appendix to the Petition for Certiorari are two unreported decisions in other cases involving overvaluation claims: *Union Pacific R.R. v. Department of Revenue*, Nos. 85-2102LE, 85-2103LE (D. Or. May 6, 1986), Pet. App. 77a-80a (order denying motion to dismiss); *Burlington Northern R.R. v. Department of Revenue*, No. C85-767T (W.D. Wash. Oct. 25, 1985), Pet. App. 71a-76a (order granting preliminary injunction).

In sum, section 306 should be interpreted to prohibit all forms of state tax discrimination against railroads, including discrimination resulting from overvaluation of railroad property. Such a construction furthers the statute's remedial objectives while respecting the balance Congress struck between state and federal interests. States will remain free to adopt their own methods of taxation, and to experiment with those methods as they see fit. What this interpretation of section 306 will *not* permit is a return to the era in which states felt free to impose discriminatory taxes on interstate railroads at the expense of those who depend upon the Nation's interstate transportation system. The limited but vital federal intervention mandated by section 306 is well within the power of Congress, and there is no reason to give the statute anything less than its plain meaning.

### CONCLUSION

This Court should reverse the order and judgment of the Court of Appeals, and the case should be remanded to the District Court for trial of Burlington Northern's section 306 claim of tax discrimination resulting from overvaluation of its railroad property, without any requirement to show discriminatory purpose or intent.

Respectfully submitted,

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December 12, 1986

# **APPENDIX**



## APPENDIX

Prior to 1976, section 13(4) stated (emphasis added):

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or *any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce* (which the Commission may find without a separation of interstate and intrastate property, revenues and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, or burden: Provided, That upon the filing of any petition authorized by the provisions of paragraph (3) of this section to be filed by the carrier concerned, the Commission shall forthwith institute an investigation as aforesaid into the lawfulness of such rate, fare, charge, classification, regulation, or practice (whether or not theretofore considered by any State agency or authority and without regard to the pendency before any State agency or authority of any proceeding relating thereto) and shall give special expedition to the hearing and decision therein. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby,

the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Section 13(4) was ultimately superseded by section 214 of the Staggers Rail Act of 1980, which expanded federal control over intrastate rates. *See* Pub. L. 96-448 § 214(a)-(c) (1), 94 Stat. 1913, 1915 (codified at 49 U.S.C. § 11501 (1982)). Under the Staggers Act, states are permitted to regulate intrastate rates only if they follow the standards and procedures of the Interstate Commerce Act. *Id.* Each state's standards and procedures must now be certified by the Interstate Commerce Commission, which is further empowered to review individual decisions of state regulatory agencies. *See, e.g., Utah Power & Light Co. v. ICC*, 764 F.2d 865, 867-68 (D.C. Cir. 1985).

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No. 86-337

Supreme Court, U.S.  
**FILED**

**DEC 12 1986**

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CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY, PETITIONER

v.

OKLAHOMA TAX COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER

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### **QUESTION PRESENTED**

Whether, in a case alleging that a state has overvalued railroad property for ad valorem property tax purposes, the prohibition against discriminatory state taxation of railroads in Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. 11503, is limited to purposeful overvaluation with discriminatory intent.

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## In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-337

BURLINGTON NORTHERN RAILROAD COMPANY, PETITIONER

v.

OKLAHOMA TAX COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER

## INTEREST OF THE UNITED STATES

This case concerns the scope of federal court jurisdiction to enjoin discriminatory state taxation of railroads under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 54 (codified at 49 U.S.C. 11503). The 4R Act sets out a comprehensive framework for revitalizing the Nation's railroads. Section 306 is an integral part of this national transportation policy and is intended to protect interstate rail commerce from the burdens of discriminatory state taxation. The United States has a strong interest in preserving the federal courts' power to enforce these statutory protections. This Court on a previous occasion has invited the United States to express its views on the question presented. See U.S. Amicus Br., *Burlington N. RR. v. Lennen*, No. 83-802, cert. denied, 467 U.S. 1230 (1984) (U.S. *Lennen* Br.).

(1)

## STATEMENT

1. Section 306 of the 4R Act prohibits, and vests federal district courts with jurisdiction to enjoin, discriminatory state taxation of railroads. The 4R Act as a whole sets out a comprehensive congressional response to the economic deterioration of the rail industry. Section 306 focuses on discriminatory state taxation as a particular cause of that decline. See, *e.g.*, H.R. Rep. 94-725, 94th Cong., 1st Sess. 78 (1975). After 15 years of study, Congress found that excessive state taxation "constitute[s] an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce" (§ 306(1), 90 Stat. 54). Accordingly, in the exercise of its plenary power to protect the channels of interstate commerce, Congress carved out an exception to the Tax Injunction Act, 28 U.S.C. 1341, and empowered federal courts to enjoin prohibited forms of discriminatory state taxation.

Section 306 broadly prohibits a state from imposing any tax that "results in discriminatory treatment of a common carrier by railroad" (§ 306(1)(d), 90 Stat. 54).<sup>1</sup> With respect to tax rates, the statute forbids a state or political subdivision to levy or collect an ad valorem tax on railroad property at a rate that exceeds the rate generally applicable to commercial and industrial property in the same jurisdiction (§ 306(1)(c), 90 Stat.

<sup>1</sup> This statutory language, along with certain other statutory provisions, was altered slightly when Section 306, originally codified at 49 U.S.C. (1976 ed.) 26c, was recodified in 1978 at 49 U.S.C. 11503. See Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337 *et seq.* The changes effected by the 1978 recodification were made solely "for clarity" (see 49 U.S.C. 11503 (historical and revision notes)) and "may not be construed as making a substantive change in the laws replaced" (Pub. L. No. 95-473, § 3(a), 92 Stat. 1466). Although there is thus no substantive difference between the original and recodified versions of the statute, it has become customary to refer to it by citing the relevant subsections of Section 306, and we will follow that practice here.

54). With respect to tax assessments (and taxes levied or collected on the basis of such assessments), the statute requires that a state's assessment practices be tested by a simple comparison of two arithmetic ratios. Under that test, a state's assessment practices are unlawfully discriminatory if the ratio of assessed value to true market value (referred to as the "assessment ratio") for railroad property exceeds the assessment ratio for "all other commercial and industrial property" (§ 306(1)(a) and (b), 90 Stat. 54).

In proceedings brought under Section 306, "the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law" (§ 306(2)(d), 90 Stat. 55). The statute also provides that the assessment ratio for non-railroad commercial and industrial property may be established "through the random-sampling method known as a sales assessment ratio study" (§ 306(2)(e), 90 Stat. 55).<sup>2</sup> If the assessment ratio for non-railroad property cannot be satisfactorily established by that method, the court must base its comparison on the assessment ratio for "all other [non-exempt] property in the assessment jurisdiction," not just for commercial and industrial property (*ibid.*).

A federal court that finds state property tax assessments to discriminate against railroads is empowered to enjoin the violation. The statute provides (§ 306(2), 90 Stat. 54):

Notwithstanding any provision of section 1341 of title 28 [United States Code, the Tax Injunction Act], or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such

<sup>2</sup> A "sales assessment ratio study" compares the assessed value to the actual sale price for a representative and statistically valid sample of property within the assessment jurisdiction. See International Association of Assessing Officers, *Improving Real Property Assessment* 122-155 (1978).



mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section \* \* \*.

The scope of this equitable jurisdiction is limited by the provisions (described above) defining the burden and manner of proving the "assessment ratio." See § 306 (2) (d) and (e), 90 Stat. 55. The scope of the court's jurisdiction is also limited in two other respects. State taxing authorities were given a grace period of three years following enactment—that is, until February 5, 1979—before Section 306 took effect (§ 306(2) (b), 90 Stat. 54). And a district court is barred from granting any relief under Section 306 unless the railroad proves that the assessment ratio for its property exceeds the assessment ratio for other commercial and industrial property by at least 5% (§ 306(2) (c), 90 Stat. 54).

The courts of appeals have unanimously concluded that Section 306 prohibits both de jure and de facto discrimination. See *Atchison, T. & S.F. Ry. v. Board of Equalization*, 795 F.2d 1442 (9th Cir. 1986); *Richmond, F. & P. R.R. v. Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985); *Louisville & N. R.R. v. Department of Revenue*, 736 F.2d 1495, 1498 (11th Cir. 1984); *Burlington N. R.R. v. Lennen*, 715 F.2d 494, 497 (10th Cir. 1983), cert. denied, 467 U.S. 1230 (1984); *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir.), cert. denied, 454 U.S. 1086 (1981). De jure discrimination occurs when state laws apply a different tax rate or a different assessment percentage to railroad property than they apply to other commercial and industrial property. De facto discrimination occurs when the tax rates and assessment percentages are nominally the same but produce disparate results, in that the "assessment ratios" for railroad and non-railroad property are different.<sup>3</sup>

<sup>3</sup> States typically calculate assessed value (the numerator in the "assessment ratio") as a percentage of true market value (the denominator in the "assessment ratio"). If a state has accurately

De facto discrimination may arise in two ways. A state may underestimate the true market value of non-railroad property, without equivalently underestimating the true market value of railroad property. Alternatively, the state may overestimate the true market value of railroad property, without equivalently overestimating the true market value of non-railroad property. In either event, the "assessment ratios" for railroad and non-railroad property will differ, in violation of Section 306(1) (a). A railroad's claim of the first type of de facto discrimination has been termed by the courts a claim for "equalization" relief. A railroad's claim of the second type of de facto discrimination has been termed a claim for "valuation" relief. See, e.g., *Pet. App. 2a; Burlington N. R.R. v. Lennen*, 715 F.2d at 496, 497. We find this terminology confusing, and will generally refer in this brief to "undervaluation" and "overvaluation" claims, respectively.

2. This case involves an overvaluation claim. Petitioner, a rail carrier, brought this action in the United States District Court for the Western District of Oklahoma to enjoin the Oklahoma Tax Commission from collecting ad valorem property taxes alleged to be excessive and discriminatory under Section 306.<sup>4</sup> Petitioner asserted that Oklahoma tax authorities had so drastically overestimated the market value of its transportation property that the assessment ratio for its property was far in excess of the ratio for non-railroad property (*Pet. App. 31a-32a*).

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calculated true market value, this assessment percentage will obviously be the same as the "assessment ratio" independently determined in court. These two figures will differ when the market value declared by the state is not the true market value.

<sup>4</sup> Petitioner has also challenged the tax assessment pursuant to procedures made available under Oklahoma law. See *Okla. Stat. Ann. tit. 68, §§ 2465-2468* (West 1966 & Supp. 1985). We understand that those administrative proceedings are currently pending.



The district court, though acknowledging that "the [respondents] themselves admit the existence of a legitimate valuation dispute between the parties," concluded that it lacked jurisdiction to entertain petitioner's claim of discriminatory overvaluation (Pet. App. 16a). In so ruling, the district court relied on the Tenth Circuit's earlier decision in *Burlington N. R.R. v. Lennen*, 715 F.2d at 497-498. In *Lennen*, the Tenth Circuit held that Section 306 was not "intended to provide relief from every form of de facto discrimination" and that only "equalization, not valuation, relief was intended to be made available to the railroads" (*ibid.*). The court noted that Section 306(2) (e) specifies statistical random sampling as a permissible method for determining the true market value of non-railroad property, whereas the statute "contains no discussion of a proper method for valuing rail property"; the Tenth Circuit inferred from this silence a legislative intent that courts should refrain from taking jurisdiction of a railroad's claim that its property had been overvalued (715 F.2d at 497). The Tenth Circuit in *Lennen* also reasoned that, if Section 306 were construed to permit railroads to bring federal court challenges to the states' computation of railroad property's market value, that construction "would impose significant burdens on district courts and would substantially thwart the tax collection process of states and their subdivisions" (715 F.2d at 498). The *Lennen* court ultimately held that Section 306 affords no relief from discriminatory overvaluation of railroad property unless the complaining railroad "can make a strong showing of a purposeful overvaluation \* \* \* with discriminatory intent" (715 F.2d at 498).

Turning to the facts of the instant case, the district court held that it was "without jurisdiction to entertain [petitioner's] *de facto* discrimination claims of overvaluation" (Pet. App. 16a). The court stated that the jurisdictional issue of discriminatory intent had to be "resolved prior to trial" (*id.* at 12a) and that petitioner's

pre-trial filings therefore had to "make the requisite 'strong prima facie case of \* \* \* intentional discrimination'" (*ibid.* (quoting *Lennen*, 715 F.2d at 498)). The court concluded that petitioner had not made the necessary showing of discriminatory intent (Pet. App. 14a-16a) and accordingly "dismissed for lack of subject matter jurisdiction" (*id.* at 16a-17a).

On appeal, petitioner first sought en banc review of the district court's decision, arguing that the Tenth Circuit should overrule *Lennen*. The United States filed a brief amicus curiae in support of that request. We noted that the Eighth Circuit's decision in *Burlington N. R.R. v. Bair*, 766 F.2d 1222 (1985), conflicted with the ruling in *Lennen* and that the issue was of considerable importance to national transportation policy.

The Tenth Circuit rejected petitioner's request for en banc review and thereby declined to reconsider *Lennen* (Pet. App. 19a). A panel of the Tenth Circuit subsequently heard petitioner's appeal and affirmed the district court's conclusion that *Lennen* compelled dismissal of the instant suit for lack of subject matter jurisdiction. The panel first reaffirmed the soundness of *Lennen*, reiterating the concern expressed in the earlier case that federal courts should not be asked to "'sit as state tax assessment boards for railroad property'" (Pet. App. 2a-3a (quoting *Lennen*, 715 F.2d at 498)). The court then agreed with the district court that petitioner had "failed to establish a strong initial showing of [a] prima facie case of intentional discrimination" (Pet. App. 3a). The court reasoned that petitioner had failed to allege that Oklahoma revenue officials had made "remarks regarding an intent to discriminate in valuation" (*ibid.*), had failed to allege any valuation procedure that was discriminatory "on its face" (*id.* at 3a-4a), and had failed to allege "facts from which a trier of fact reasonably could infer discriminatory intent, such as assessments based on flat rates that take no account of an item's value, assessments that ignore changed business conditions, or unexplained

radical changes in the methods for calculating value" (*id.* at 4a).

### SUMMARY OF ARGUMENT

The plain language of the 4R Act bars any state law or practice that compels a railroad to pay a disproportionate share of property taxes. The statute defines the prohibited discrimination in purely arithmetic terms, and neither the statutory language nor the legislative history furnishes any support for the Tenth Circuit's requirement that a railroad complaining of discriminatory overvaluation of its property show purposeful overvaluation with discriminatory intent. Indeed, an intent requirement would frustrate Congress's clear purpose—to provide a remedy for all forms of discriminatory state taxation and thus alleviate the crippling economic burden that such taxation had placed on railroads.

The purpose of Section 306 would likewise be frustrated, and the language of the statute rather egregiously rewritten, by the Tenth Circuit's holding that a federal court may not look behind a state's determination of the true market value of railroad property. Treating the state determination as conclusive would deprive the court of the power to scrutinize an assessment for discrimination. Since state property tax assessments are based on the valuation of property, a court cannot measure state taxation against the statutory standards without independently determining the true market value of railroad property. The legislative history makes it plain that Congress understood the necessity of this inquiry, and the statute therefore provides that true market value is an element to be proved by the plaintiff, and adjudicated by the court, in a *de facto* discrimination suit under Section 306.

The Tenth Circuit invented its "discriminatory intent" requirement, and conversely sought to restrict judicial inquiry into the market value of railroad property, out of concern with overburdening the federal courts and with intruding upon state tax administration. These con-

cerns are misplaced. Congress took these matters into account when enacting Section 306 and decided, because of the inadequacies of existing state remedies for discriminatory taxation, to create under its Commerce Power an extraordinary exception to the Tax Injunction Act. It is not for the courts to disrupt the congressional balance between federal and state interests, as long as the balance that Congress has struck is authorized by the Constitution. In any event, the statute itself limits the intrusion on state government and the burden on federal courts. An erroneous valuation of railroad property is not, by itself, a ground for bringing suit under the statute; rather, *discrimination* against the railroad must be proved to make out a violation, and only if the disparity exceeds a 5% margin is judicial relief available. Thus, contrary to the Tenth Circuit's view (*Lennen*, 715 F.2d at 498), giving the statute its plain meaning will not require the federal courts to "sit as state tax assessment boards for railroad property."

### ARGUMENT

#### I. SECTION 306 BARS ANY STATE PROPERTY TAX THAT DISCRIMINATES AGAINST RAILROADS, WITHOUT REGARD TO THE STATE'S INTENT

The Tenth Circuit's requirement that a railroad claiming discriminatory overvaluation prove discriminatory intent is contrary to the plain language of Section 306. The catch-all provision of Section 306, as the original statutory language makes plain, prohibits "*any* \* \* \* tax which *results in* discriminatory treatment of a common carrier by railroad" (§ 306(1)(d), 90 Stat. 54 (emphasis added)).<sup>5</sup> Section 306(1)(c), which concerns tax rates,

<sup>5</sup> The courts of appeals have construed Section 306(1)(d) as prohibiting tax discrimination in any form whatsoever. See, e.g., *Alabama G. S. R.R. v. Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981) (state license tax); *Richmond, F. & P. R.R. v. Department of Taxation*, 762 F.2d 375 (4th Cir. 1985) (corporate income tax);



prohibits the taxation of railroad property "at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction" (90 Stat. 54); a state's "intent" in taxing a railroad at a higher rate is obviously irrelevant under that subsection. Section 306(1)(a) defines its prohibition against discriminatory assessments in terms of a simple arithmetic ratio of assessed value to true market value, and that definition likewise makes irrelevant any consideration of discriminatory intent. In short, the statute makes no reference to discriminatory intent; it focuses solely on the *results* of state taxing practices.

The legislative history<sup>6</sup> is devoid of any indication that the "discriminatory treatment" standard set out in the statute was meant to incorporate a threshold requirement of discriminatory intent. Rather, the legislative history confirms that Congress's clear purpose was to relieve the "undue burden" (§ 306(1), 90 Stat. 54) that discriminatory taxation placed on railroads in interstate commerce. Congress found in 1969 that discriminatory taxation "de-

see also *Atchison, T. & S.F. Ry. v. Bair*, 338 N.W.2d 338, 344 (Iowa 1983) (en banc), cert. denied, 465 U.S. 1071 (1984) (fuel consumption excise tax).

<sup>6</sup> Before enacting Section 306, Congress considered a number of similar proposals to bar discriminatory taxation of carriers operating in interstate commerce. See S. Rep. 445, 87th Cong., 1st Sess. 465 (1961); *Tax Assessments on Common Carrier Property: Hearing on H.R. 736 & H.R. 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 2d Sess. 2 (1964) [hereinafter cited as *Hearing on H.R. 736 & H.R. 10169*]; *Tax Assessments on Common Carrier Property: Hearings on H.R. 4972 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 1 (1966); S. Rep. 1483, 90th Cong., 2d Sess. 9 (1968); S. Rep. 91-630, 91st Cong., 1st Sess. 10 (1969); S. Rep. 92-1085, 92d Cong., 2d Sess. 2 (1972). Because these prior proposals closely resemble Section 306, the courts of appeals have correctly considered the related congressional hearings and reports as evidence of Congress's intent in enacting Section 306. See, e.g., *Arizona v. Atchison, T. & S.F. R.R.*, 656 F.2d 398, 404 n.6 (9th Cir. 1981); *Lennen*, 715 F.2d at 497-498.

prive[s] \* \* \* a carrier of revenues needed in the performance of its services in interstate commerce" (S. Rep. 91-630, 91st Cong., 1st Sess. 9 (1969)). After further study, Congress concluded (H.R. Rep. 94-725, 94th Cong., 1st Sess. 78 (1975)):

[R]ailroads are over-taxed by at least \$50 million each year. In view of the generally poor economic condition of the railroad industry and the effect such economic hardship is having on the ability of the industry to adequately serve our national rail transportation needs, the Committee [on Interstate and Foreign Commerce] believes discriminatory property and "in lieu" taxation should be ended.

Section 306 was accordingly enacted "to eliminate the long-standing burden on interstate commerce resulting from discriminatory State and local taxation of common and contract carrier transportation property" and to end "the discriminatory tax practices weakening our national transportation system" (S. Rep. 91-630, *supra*, at 1, 3).

The intent behind a discriminatory state tax on railroads is clearly irrelevant in light of this congressional objective. The burden on railroads is the same regardless of the taxing authority's intent. An intent requirement would thus directly undermine the statutory goal by exempting from the bar of Section 306 a large class of discriminatory and economically burdensome taxation that Congress intended to eliminate. In short, Section 306, written without reference to discriminatory intent and concerned only with the effects of taxation, cannot require proof of discriminatory intent as a prerequisite to relief.

This plain-meaning construction of Section 306 is bolstered by parallels to similar prohibitions in other laws. First, there is no intent requirement in the prohibitions on discriminatory taxation, modeled on Section 306, that Congress subsequently enacted for motor carriers, buses,



and air carriers.<sup>7</sup> Nor was there an intent requirement under the anti-discrimination prohibition of former Section 13(4) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 13(4). See, e.g., *Illinois Commerce Comm'n v. United States*, 292 U.S. 474, 484 (1934). Finally, a simple "effects" reading of Section 306 is supported by this Court's decisions defining the constitutional prohibitions on state taxes that discriminate against interstate commerce or federal property. In both of those areas, inequality of tax burdens is the focus of the prohibition, and this Court has therefore held that there is no need to prove discriminatory intent in order to obtain relief. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-271 (1984); *Washington v. United States*, 460 U.S. 536, 544 (1983); *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 397 (1983); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981). Since Congress enacted Section 306 to give railroads greater protection than had been afforded to them under this Court's constitutional jurisprudence, it would be odd to read into Section 306 a burden-of-proof requirement that a railroad would be spared under the Commerce Clause. Every court of appeals that has addressed the question, apart from the Tenth Circuit, has thus concluded, correctly, that a "discriminatory intent" requirement has no place in interpreting Section 306.<sup>8</sup>

<sup>7</sup> See Motor Carrier Act of 1980, Pub. L. No. 96-296, § 31, 94 Stat. 823 (codified at 49 U.S.C. 11503a); Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 20, 96 Stat. 1122 (likewise codified at 49 U.S.C. 11503a); Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, § 532, 96 Stat. 701 (codified at 49 U.S.C. App. 1513(d)). The last-mentioned provisions respecting air carriers are at issue in *Western Air Lines, Inc. v. South Dakota Bd. of Equalization*, No. 85-732.

<sup>8</sup> See, e.g., *Atchison, T. & S.F. Ry. v. Board of Equalization*, 795 F.2d at 1446 (Section 306 is intended to afford relief from every form of de facto discrimination regardless of intent); *Louisville & N. R.R. v. Department of Revenue*, 736 F.2d at 1498 (intent is not a precondition for relief once disparate impact is shown); *Trailer*

## II. SECTION 306 FORBIDS DISCRIMINATORY OVERVALUATION OF RAILROAD PROPERTY AND THUS OF NECESSITY REQUIRES FEDERAL COURTS TO MAKE AN INDEPENDENT DETERMINATION OF THE TRUE MARKET VALUE OF THAT PROPERTY

The Tenth Circuit devised its threshold test of "discriminatory intent" for Section 306 overvaluation claims in order to eliminate or reduce the need for federal court review of state determinations of the true market value of railroad property (Pet. App. 2a; *Lennen*, 715 F.2d at 497-498). Believing such a judicial inquiry into market value to be inappropriate and not intended by Congress, the court held that Section 306 permits railroads to bring *undervaluation* claims, which require review of the true market value of non-railroad property, but precludes them—absent a showing of discriminatory intent—from bringing *overvaluation* claims, which require review of the true market value of railroad property (*Lennen*, 715 F.2d at 497-498). This distinction, as well as the premise supporting it, is contrary to the language, history, and purposes of Section 306.

A. The statutory language itself calls for an independent federal inquiry into the true market value of railroad property. Section 306 makes "true market value" of railroad property an integral element of the statutory test for ascertaining whether state taxation is discriminatory. Indeed, insofar as de facto discrimination is concerned, this element determines the value of one of the two "assessment ratios" that must be compared in the test for unlawful discrimination. Nothing in the text or structure of the statute supports the extraordinary notion that a district court should be barred from making an independent finding on a critical factual element of the plaintiff's claim. The district court below acknowledged "the

*Train Co. v. State Bd. of Equalization*, 710 F.2d 468, 472 (8th Cir. 1983) (Section 306 bars taxation that results in discrimination); *Alabama G. S. R.R. v. Eagerton*, 663 F.2d at 1040 (Section 306 bars taxation that is discriminatory in effect).

existence of a legitimate valuation dispute between the parties" (Pet. App. 16a), and it would be contrary to all norms of judicial procedure to require a court to accept as true the defendant's determination of value even though it is contested by the plaintiff. In fact, Section 306(2)(d) clearly contemplates adjudication of this issue, specifying that "the burden of proof with respect to the determination of assessed value *and true market value* shall be that declared by the applicable State law" (emphasis added). Nothing in the statute suggests that this provision applies only to non-railroad property, and this reference clearly indicates Congress's understanding that questions of value *in general* would be subject to litigation in cases under Section 306.

The Tenth Circuit, observing that the statute (§ 306(2)(e), 90 Stat. 55) specifies certain methods for measuring the true market value of non-railroad property but does not specify methods for valuing railroad property (*Lennen*, 715 F.2d at 497), inferred from the statutory text that inquiry into the value of railroad property is barred. That inference is wholly unwarranted. In light of the obvious difficulty of directly measuring the true market value of every piece of taxable commercial and industrial property in a taxing jurisdiction, Congress sensibly specified that random-sampling techniques—such as a "sales assessment ratio study"—may be used to value non-railroad property. There was no comparable need to specify a method for establishing the value of railroad property, for railroad property can be valued without resort either to a laborious item-by-item cumulation or to averaging or random-sampling techniques. Indeed, Congress was well aware that states commonly value railroad property by the "unit method," a method that considers a railroad's total value, then allocates a share ratably to each state in which the railroad does business. See S. Rep. 91-630, *supra*, at 25-26; S. Rep. 1483, *supra*, at 22. Under the "unit method," obviously, there is no need to appraise each item of railroad property separately and

then aggregate the results. See, e.g., *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919). Accordingly, there was especially little need for Congress to designate in Section 306 permissible methods for calculating the market value of a railroad's holdings in a state.

B. Like the statutory language, the legislative history of Section 306 contains no evidence that Congress intended to bar a federal court from looking behind state valuations of railroad property. Indeed, the contrary intent is implicit in Congress's recognition that railroads "are discriminated against as compared to other property taxpayers in the same jurisdiction, due in large measure to outdated procedures (which are sometimes deliberately retained) for assessment of property" (S. Rep. 91-630, *supra*, at 2 (citation omitted)). Discriminatory assessments caused by "outdated procedures" could hardly be addressed without scrutiny of state valuations. Moreover, Congress contemplated that "true market value" was to be the standard to which state valuations would be compared in determining discrimination (*id.* at 25-26; S. Rep. 1483, *supra*, at 22; see page 18, *infra*). "True market value" would not be much of a litmus test if the state's own assertions as to true market value were dispositive.

Throughout the hearings leading up to the enactment of Section 306, state representatives repeatedly objected to an assessment-ratio test, like the one ultimately adopted by Congress, on the precise ground that it would require federal court review of state determinations of market value. For example, a spokesman for an organization of state taxing officials observed (*Discriminatory Taxation of Common Carriers: Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 114 (1967) (statement of Charles F. Conlon) (emphasis in original)):

If there is any question about the assessment ratio used by the state agency, then the reviewing agency—whether it be a board of tax appeals, a state court or a United States district court—must decide



whether the property has been correctly valued in order to determine what percentage of that value is *actually* used for assessment purposes. This step is unavoidable in the circumstances.

Senator Lausche made a similar point in a dissenting statement attached to a key committee report. S. Rep. 1483, *supra*, at 26. Similarly, the Director of the Washington State Department of Revenue testified regarding proposed legislation setting forth an assessment ratio test (*State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 99 (1969) [hereinafter cited as *Hearing on S. 2289*] (statement of George Kinnear) (emphasis added)):

[I]t would be immediately necessary \* \* \* for federal courts to review and determine the correctness of not only *valuation procedures and the actual valuation results for the carriers*, but also *the entire work of each assessing agency with respect to all other properties*. Very simply, this would become necessary because the bill concerns itself with the ratio of assessed valuation of transportation property to the true market value of such property \* \* \*.

To avoid this result, the State of Washington proposed an amendment that would have expressly foreclosed federal court review of true market value by defining the term to mean the "true market value finally determined in accordance with state statutory procedures" (*id.* at 102). This suggested amendment, which would have had precisely the same effect as the rule adopted by the Tenth Circuit, was never enacted.<sup>9</sup>

<sup>9</sup> The legislative history is replete with testimony observing that an assessment-ratio test would require federal court review of the true market value determination. See, e.g., *Hearing on H.R. 736 & H.R. 10169, supra*, at 2 (comments of Abe McGregor Goff, Chairman of the Interstate Commerce Commission); *Common and Contract Carrier State Property Tax Discrimination: Hearing on H.R. 16245, et al. Before the Subcomm. on Transportation and Aero-*

The Tenth Circuit relied in part (*Lennen*, 715 F.2d at 497-498) on certain statements in some early committee reports that the assessment-ratio test for discriminatory taxation was not intended to require states to change their assessment practices or standards and that true market value was "not a standard for determining value" (S. Rep. 91-630, *supra*, at 10, 25-26; S. Rep. 1483, *supra*, at 22-23). Those statements lend no support whatever to the Tenth Circuit's view. To begin with, Section 306 as enacted differs from, and places greater restrictions on states than, the legislation considered by Congress in 1968 and 1969, the time of the cited legislative history. In particular, Section 306, unlike the bills considered in earlier years, and contrary to statements in the committee reports to which the Tenth Circuit referred, *does require* changes in state assessment practices that treat different kinds of property differently. See pages 20-21, *infra*. Section 306, unlike the earlier bills, also contains a broad catch-all prohibition against "any other tax which results in discriminatory treatment of a common carrier by railroad" (§ 306(1)(d), 90 Stat. 54). Accordingly, even if the early legislative history were thought to suggest some limitation upon judicial authority to inquire into "true market value," that limitation would be of dubious relevance to the law as enacted.

In any event, the context of the statements shows that they in fact contain no such suggestion. The committee reports note that "true market value" is the objective goal at which assessors theoretically aim and that the "unit method" (see pages 14-15, *supra*) is used in most, though not all, states for valuing railroad property. The

*navitics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 94 (1970) (statement of Charles Ottermann, Chief Counsel, Cal. State Bd. of Equalization); *Surface Transportation Legislation: Hearings on S. 2362, et al. Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 208-209 (1972) (testimony of Charles F. Conlon); *Hearing on S. 2289, supra*, at 59 (testimony of Broley E. Travis).



reports then explain (S. Rep. 91-630, *supra*, at 25-26; S. Rep. 1483, *supra*, at 22) that the proposed legislation

does not suggest or require a State to change its assessment standards, assessment practices, or the assessments themselves. It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other. It is not a standard for determining value; it is a standard to which values that have already been determined must be compared. This standard is "true market value" (also the generally accepted standard for assessment purposes) and the requirement is that carrier property be assessed at the same proportion of such value as the proportion at which all other property subject to the same tax rates is assessed.

Thus, "true market value" was not an assessment method or practice that the states were being required by Congress to adopt; states could use any method they liked as long as it did not result in discriminatory taxes. Rather, "true market value" was the standard to which state assessments were to be compared.<sup>10</sup> Since the standard of comparison must be independently determined before anything can be compared to it, this legislative history, far from interdicting judicial inquiry into market value, affirmatively requires it.

C. A bar on judicial inquiry into the market value of railroad property is not only unsupported in the language and legislative history of Section 306, but would gravely weaken the protections of the statute. As we have noted,

<sup>10</sup> In *Greene v. Louis & I. R.R.*, 244 U.S. 499 (1917), this Court drew an analogous distinction in interpreting state law provisions requiring uniform taxation. The Court noted that the state uniformity provisions did permit different modes of assessment (*id.* at 513), provided that the different methods employed resulted in equal tax burdens; the Court thus observed that "the principal if not the sole reason for adopting 'fair cash value' as the standard for valuations, is as a convenient means to an end—the end being equal taxation" (*id.* at 516).

the statute is intended to prohibit *all* discriminatory taxation of railroads, and it thus prohibits de facto as well as de jure discrimination (see S. Rep. 91-630, *supra*, at 3, 9 (discriminatory taxation forbidden whether by law, "practice, or otherwise"); see also S. Rep. 1483, *supra*, at 8; 121 Cong. Rec. 41341 (1975) (Rep. Skubitz)). If a state's determination of true market value were regarded as conclusive, one of the two forms of de facto discrimination—discriminatory overvaluation of railroad property—would be excised from the coverage of the statute. As the Eighth Circuit observed, states would then "be free to discriminate against railroads by assessing a value far in excess of the true market value, while assessing all other property at true market value, and then asserting \* \* \* that assessed value is always equal to true value" (*Burlington N. R.R. v. Bair*, 766 F.2d 1222, 1225-1226 (8th Cir. 1985)).

Congress plainly intended to eliminate tax discrimination against railroads whether effected by discriminatory overvaluation of railroad property or by discriminatory undervaluation of non-railroad property. While local tax assessors have an economic and political incentive to undervalue commercial and industrial property in order to lighten their constituents' tax burden (see 1 J. Bonbright, *The Valuation of Property* 498, 503 (1937) (state boards of equalization created to redress this problem)), state tax assessors have an equally strong, though different, incentive to overvalue railroad property. Congress itself recognized (S. Rep. 92-1085, 92d Cong., 2d Sess. 4 (1972)) that

[r]egulated interstate carriers, especially railroads, are easy prey for State and local tax assessors. They are non-voting, often non-resident, targets for local taxation, and cannot remove their rights-of-way and terminals even if the burden of tax discrimination becomes heavy. Their statutory obligation as regulated common carriers further roots them to their location since they are obliged to provide service to the locality.

Thus, Congress was centrally concerned with railroads' vulnerability to burdensome overvaluation of their property, an evil that Congress specifically identified as one form of prohibited discrimination (H.R. Rep. 94-725, *supra*, at 113). The Tenth Circuit's rule barring full and independent adjudication of railroads' overvaluation claims would be squarely contrary to this congressional intent.

### III. A JUDICIAL NARROWING OF SECTION 306 CANNOT BE JUSTIFIED ON THE THEORY THAT THE STATUTE AS WRITTEN UNREASONABLY INTERFERES WITH STATE TAX COLLECTION OR UNDULY BURDENS FEDERAL COURTS

The Tenth Circuit rejected the plain meaning of Section 306 out of concern that federal court jurisdiction of overvaluation claims would "impose significant burdens on district courts and would substantially thwart the tax collection process of states and their subdivisions" (*Lennen*, 715 F.2d at 498). Given Congress's purpose in enacting the statute, these concerns are both improper as a basis of statutory construction and, in any event, exaggerated. The task of accommodating state interests is, within the terms set by the Constitution, one for Congress, not for the courts, and Congress enacted into law a deliberately unusual although constitutionally valid balance of federal and state interests, a balance that differs from that prevalent in the field of state taxation generally. Moreover, the Tenth Circuit vastly overestimated the actual burden that is imposed on federal courts and state tax collection processes by permitting railroads to prove discriminatory overvaluation of their property without proving discriminatory intent.

A. In enacting Section 306, Congress exercised its Commerce Power to "interfere" with state tax administration in several carefully considered—and relatively modest—ways. Substantively, the statute set a new standard of non-discrimination limiting state tax prac-

tices. This new standard required states to cease applying different assessment percentages or tax rates to different classes of property—even though such differential treatment might be allowable under state law—if that practice would result in discrimination against railroad property. Thus, whereas the Senate version of Section 306 in the 94th Congress would have permitted differential classification of property for state tax purposes if such classifications were set forth in the state constitution, the Conference bill deleted that provision (S. Rep. 94-595, 94th Cong., 2d Sess. 166 (1976)). Section 306 as enacted therefore requires comparison of the assessment ratio for railroad property to the assessment ratio for *all* other commercial and industrial property in the taxing jurisdiction.<sup>11</sup>

In addition to these substantive effects upon state taxing authority, Section 306 provides for an exception—one of the few such exceptions found in the United States Code—to the Tax Injunction Act, 28 U.S.C. 1341. That Act is "first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522 (1981). The Tax Injunction Act thus embodied Congress's decision "to transfer jurisdiction over a class of substantive federal claims from the federal district courts to the state courts, as long as state-court procedures were

<sup>11</sup> The "interference" in state taxing authority worked by the Conference Committee's action is evident in this case. Oklahoma law permits public service corporations, including railroads, to be singled out for different tax treatment (Okla. Stat. Ann. tit. 68, § 2442 (West 1966 & Supp. 1985)) and under Oklahoma law "it is not necessary that the property of public service corporations be valued at the same percentage of actual value as that placed on other classes of property" (*McLoud Telephone Co. v. State Bd. of Equalization*, 655 P.2d 1037, 1039 (Okla. 1982) (citation omitted)). Section 306 as enacted specifically displaces these provisions of Oklahoma law in circumstances where they would produce discrimination against railroad property.



'plain, speedy and efficient' and final review of the substantive federal claim could be obtained in this Court" (*id.* at 515 n.19).

Section 306, which removes the restraints of the Tax Injunction Act for railroads alleging discriminatory taxation, reflects a deliberate decision by Congress to transfer jurisdiction over such claims back to the federal district courts. Congress found that the Tax Injunction Act had "close[d] the doors of the Federal courts to carriers affected by discriminatory taxation" without ensuring that state remedies afforded adequate relief (S. Rep. 1483, *supra*, at 6). Witnesses testifying before Congress noted a number of deficiencies commonly found in existing state remedies, including the necessity of bringing multiple suits (one in each county or other taxing jurisdiction) to secure complete relief, the delay in obtaining a decision, the limited form of review available in state court, and the reluctance of state courts to overturn decisions of the assessing agency (*ibid.*). Congress concluded that a federal procedural remedy was necessary to vindicate the substantive rights that Section 306 created (S. Rep. 1483, *supra*, at 7). In authorizing the district courts to enforce a railroad's rights under Section 306 notwithstanding the Tax Injunction Act, Congress expressed its determination that any consequential intrusion on state tax collection was necessary to avoid demonstrable burdens on interstate commerce. See S. Rep. 1483, *supra*, at 11; see also S. Rep. 91-630, *supra*, at 6-7, 11; H.R. Rep. 94-725, *supra*, at 76-77.

The depth of Congress's concern to protect railroads from discriminatory taxing processes is also evident in the provision of the statute, as originally enacted (§ 306(1), 90 Stat. 54), stating that discriminatory taxation was prohibited notwithstanding former Section 202(b) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 302(b). That section had declared that the Interstate Commerce Act generally should not be construed "to affect the powers of taxation of the several States" (49 U.S.C. (1976 ed.) 302(b)(1)). Section 306's exception to this limitation

reconfirms what the exception to the Tax Injunction Act already makes clear—that Congress plainly intended the unusual degree of interference with the ordinary administration of state property tax collection that Section 306 by its terms authorizes. See S. Rep. 91-630, *supra*, at 9; see also S. Rep. 92-1085, 92d Cong., 2d Sess. 6-8 (1972) (noting the opposition that had been voiced to "involving the Federal courts in State tax matters" and pointing out that Section 306 had been crafted so as to "interfere[] to the least extent possible with State taxing systems"). There being no constitutional objection to this clear congressional decision, the Tenth Circuit had no license to rewrite the statute to diminish its reach.

B. In any event, the statute is limited in several ways that greatly reduce the potential for interfering with state tax collection or burdening the federal courts with inappropriate tasks. First, by delaying the effective date of Section 306 for three years (§ 306(2)(b), 90 Stat. 54), Congress gave state and local governments an opportunity to adjust their tax practices to eliminate unlawful discrimination. See S. Rep. 1483, *supra*, at 13; see also *Railroad Revitalization: Hearings on H.R. 6351 and H.R. 7681 Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 162-163 (1975) (statement of William T. Coleman, Jr., Secretary of Transportation). Second, the statute prohibits a court from awarding relief unless the railroad's assessment ratio exceeds the ratio for non-railroad property by at least 5% (§ 306(2)(c), 90 Stat. 54). Given the magnitude of railroad property values, this 5% tolerance factor is a sizable margin of error, and it protects taxing jurisdictions from injunctions where uncertainties in the assessment process produce trivial variations in assessment ratios. See S. Rep. 91-630, *supra*, at 14-15.<sup>12</sup> Third, by

<sup>12</sup> It is noteworthy that the nondiscrimination provision governing air carriers (49 U.S.C. App. 1513(d)), which contains no exception to the Tax Injunction Act and hence does not permit suits



adopting state law regarding the burden of proof (§ 306(2)(d), 90 Stat. 55), the statute generally imposes the burden of proving assessment discrimination on the rail carriers. Any difficulties that attend proof of de facto discrimination must thus be surmounted initially by the railroad as part of its prima facie case. See S. Rep. 91-630, *supra*, at 15. Fourth, by prohibiting only that portion of a tax assessment determined to be excessive under the assessment-ratio test (§ 306(1)(a), 90 Stat. 54), and by leaving in place federal courts' ordinary equitable power to structure remedies so as to avoid unjustly burdening the litigants (H.R. Rep. 94-725, *supra*, at 78), the statute protects state tax collection to the maximum extent possible consistent with the need to eliminate unlawful discrimination.<sup>13</sup>

The Tenth Circuit's fear of federal court displacement of state taxing authority not only ignores the statutory limitations that we have just discussed but also, and more fundamentally, ignores the limitations inherent in Section 306's character as an *anti-discrimination* provision. An erroneous valuation of railroad property is not, in and of itself, a violation of the statute and will not support a suit under Section 306. Thus, if a state overvalues rail-

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to be brought in federal court, contains no "de minimis" rule analogous to the 5% margin of error set forth in Section 306(2)(c).

<sup>13</sup> Congress intended district courts to enjoin only the discriminatory portion of a state tax, thus leaving states free to collect the balance of the tax (S. Rep. 91-630, *supra*, at 13). Because Section 306 sets forth a clear definition of what portion of a tax is valid, requires no assessment or levy by the federal courts, and expressly provides for the injunctive remedy, Congress believed that Section 306 was compatible with *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 751-752 (1961), which held that a federal district court may not remedy an unconstitutionally discriminatory state tax by simply excising the discriminatory portion. See S. Rep. 91-630, *supra*, at 12-13. The district court did not grant relief in this case, and this Court need not reach the issue of whether there would be any bar to a federal court's implementation of the remedial procedure that Section 306(1)(a) explicitly commands.

road property but also overvalues non-railroad property to a similar extent, there is no unlawful discrimination. Only if the state treats railroad and non-railroad property differently, and only if the margin of error exceeds 5%, does Section 306 compel a state to change its assessment practices or standards. Thus, contrary to the Tenth Circuit's view, federal courts will not, in the absence of an intent requirement for overvaluation claims, "sit as state tax assessment boards" (*Lennen*, 715 F.2d at 498) for each and every claim of error in the valuation process. The courts must instead confine relief to cases in which the valuation error discriminates against railroads, and does so to the statutorily defined degree.<sup>14</sup>

For all of these reasons, the intrusion on state tax collection that Section 306 calls for is much less substantial than the Tenth Circuit believed. Similarly, the burden that Section 306 places on federal courts is easily manageable. There are at most a few dozen reported decisions involving Section 306, even though the statute has been in effect for seven years, and even though no court of appeals except the Tenth Circuit has adopted an intent requirement to discourage the bringing of such lawsuits. Moreover, the determination of "true market value" for railroad property does not require the sort of tedious item-by-item investigation that the Tenth Circuit apparently envisioned. Under the "unit method" of valuation employed by Oklahoma (Pet. App. 8a) and most other states (see pages 14-15, *supra*), the worth of railroad property is determined by calculating the value of the entire railroad and then allocating a portion of the system value to the state. System value may in turn be

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<sup>14</sup> As we stated in our *Lennen* amicus brief (at 14-15), Section 306 applies "to overvaluations that result from an assessment rule or methodology that—either on its face or as applied—systematically determines excessive values for rail property. On the other hand, if a railroad, like any other state taxpayer, asserts only that the state made an error in reaching an excessively high value for its property, no relief for that overvaluation claim would be available under Section 306."

determined by such factors as capitalized earnings, adjusted original cost, or market price of stock and debt (see Pet. App. 8a). Proof of these factors does not require the court to engage in a time-consuming appraisal of the railroad's property, looking at each railyard, locomotive, and caboose one at a time; nor does it require any particular experience with local business or real estate conditions. To the contrary, a railroad's "system value" is typically established by standard accounting materials and expert testimony. The federal courts have previously reviewed such unit valuations in determining whether ad valorem property taxes violate the Due Process and Commerce Clauses of the Constitution. See, e.g., *Norfolk & W. Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317 (1968). Contrary to the implication of the Tenth Circuit (*Lennen*, 715 F.2d at 497), a similar investigation of "true market value" under the authority of Section 306 would not impose unmanageable burdens on the federal courts.

In sum, Congress clearly intended that federal district courts exercise equitable jurisdiction over all forms of de jure and de facto tax discrimination against railroads.<sup>15</sup> The Tenth Circuit's effort to alter the resulting

<sup>15</sup> In *Atchison, T. & S.F. Ry. v. Board of Equalization*, *supra*, the Ninth Circuit held that, although a claim of discriminatory overvaluation states a claim for relief under Section 306 without any showing of discriminatory intent, the district court should have abstained from exercising its jurisdiction pending completion of related state proceedings. See 795 F.2d at 1447. We understand that a petition for panel rehearing, confined to the abstention question, is still pending in that case. Because the Tenth Circuit in this case found no jurisdiction in the first instance, the court of appeals did not consider whether a district court should abstain from exercising its jurisdiction. We nonetheless note our agreement with the Eleventh Circuit's ruling (*Southern Ry. v. State Bd. of Equalization*, 715 F.2d 522, 529 (1983)) that Section 306 was "meant to guarantee a federal forum for railroad suits, and only an exemption from abstention in all its forms would accomplish this purpose." Congress clearly determined that federal remedies were needed to afford protection against discriminatory taxation, and that fact is

statutory balance of federal and state interests deprives the federal courts of the remedial power to end the burden on interstate commerce that prompted Congress to enact Section 306. The court of appeals' requirement of discriminatory intent is contrary to the plain meaning and purpose of the statute and seriously frustrates federal transportation policy. The decision should not be permitted to stand.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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sufficient to make abstention inappropriate. See *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 23, 26-28 (1983); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116 n.8 (1981).

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1986**

**BURLINGTON NORTHERN RAILROAD COMPANY, PETITIONER,**

**v.**

**OKLAHOMA TAX COMMISSION, et al., RESPONDENTS.**

**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

**BRIEF OF RESPONDENTS  
OKLAHOMA TAX COMMISSION  
AND ITS MEMBERS**

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## QUESTIONS PRESENTED

Whether 49 U.S.C. §11503 proscribes *de facto* discrimination resulting from the state's appraisal (overvaluation) of rail transportation property for ad valorem tax purposes?

Whether, in an overvaluation case, the United States District Courts may require a preliminary showing of purposeful overvaluation with discriminatory intent to establish subject matter jurisdiction conferred by 49 U.S.C. §11503?

Whether the United States District Courts may decide fundamental subject matter jurisdiction conferred in 49 U.S.C. §11503 without an evidentiary hearing?

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**In the Supreme Court of the United States**

OCTOBER TERM, 1986

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No. 86-337

BURLINGTON NORTHERN RAILROAD COMPANY, PETITIONER,

v.

OKLAHOMA TAX COMMISSION, ET AL., RESPONDENTS.

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**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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**BRIEF OF RESPONDENTS  
OKLAHOMA TAX COMMISSION  
AND ITS MEMBERS**

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**STATUTORY PROVISION INVOLVED**

The statute involved was originally enacted as §306 of Pub.L.No. 94-210, 90 Stat. 31, 54 (1976) (49 U.S.C. §26c), the Railroad Revitalization and Regulatory Act, and recodified in Pub.L.No. 95-473, 92 Stat. 1337, 1445-1446, (1978) (49 U.S.C. §11503), the Revised Interstate Commerce Act of 1978 (hereinafter §11503).

Most of the courts of appeals, including the Tenth Circuit, in deciding cases under §11503, have used §306 for purposes of statutory analysis. *Burlington Northern Railroad Company v. Lennen*, 715 F.2d 494 (10th Cir. 1983), cert. denied, 467 U.S. 1230 (1984) (hereinafter *Lennen*); *Ogilvie v. State Board of Equalization*, 657 F.2d 204, (8th Cir. 1981), cert. denied 454 U.S. 1086 (1981); *Clinchfield Railroad Company v. Lynch*, 700 F.2d 126 (4th Cir. 1983); and *Richmond Fredericksburg & Potomac Railroad v. Department of Taxation*, 762 F.2d 375 (4th Cir. 1985).



The language of §306 never became effective. The effective and controlling language is §11503. It is the language with which the states must comply under the Supremacy Clause, U.S. Const., art. VI, cl.2. The clarified language of §11503 should be interpreted in this statutory construction case. That language is:

**§11503. Tax discrimination against rail transportation property**

**(a) In this section —**

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

**(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:**

(1) assess rail transportation property at a value that has a higher ratio to

the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

**(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If**

the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section —

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

#### STATEMENT OF THE CASE

##### 1. *The Proceedings Below*

Petitioner, hereinafter BN, sought relief under 49 U.S.C. §11503 in the United States District Court for the Western District of Oklahoma from an alleged *de facto* assessment ratio discrimination in violation of §11503 (b) (1). BN alleged this violation resulted from an excessive appraisal or valuation for 1982 ad valorem tax purposes. (Pet.App. 23a to 34a). BN alleged that the full system value (appraisal value) of its rail transportation property, as assigned by the Respondents, the Oklahoma Tax Commission and its

members, hereinafter OTC, for 1982 ad valorem tax purposes was \$3,574,921,544.00, but that the true and correct full system value of its rail transportation property for 1982 was, according to BN's expert, \$1,495,253,000.00; and, that the OTC assigned full system value for 1981 was \$2,107,321,200.00. (Complaint, ¶¶25, 28 and 34, Pet.App. 29a to 31a). BN therefore claimed the OTC violated §11503 (b) (1) by assessing BN's rail transportation property at a value (assessed value) that has a higher ratio to true market value (appraisal value) than the ratio of the aggregate assessed value of other commercial and industrial property to the aggregate true market value.

BN did not contest the OTC's allocation factor whereby a portion of its rail transportation system value was allocated to Oklahoma. BN did not contest the statewide average assessment level, 10.87% assessment ratio, at which commercial and industrial property subject to valuation and assessment by the county assessor was assessed for 1981 ad valorem taxation. And, BN did not contest the OTC's 1981 sales assessment ratio study, either as to the method of valuation of commercial and industrial property or as to the method of sampling. BN complained that the 1982 valuation exceeded the 1981 valuation, thus it was retaliatory; and that it exceeded the 1982 valuation of its expert fee appraiser, thus it was illegal.

The OTC contradicted BN's allegations relating to the 1981 valuation before the district court. The 1981 assessed value of BN's rail transportation property and the taxes thereon had not been challenged. (J.A. 44 and 50). The 1981 assessed value was based upon a system valuation or appraisal of \$3,641,689,619.00, allocated to Oklahoma at 3.75%, or an Oklahoma fair cash value of \$136,563,361.00, and assessed at 10.99% or an assessed value of \$15,014,650.00. All these figures are supported by official state records. (J.A. 44 and 50). BN had reported



its 1981 assessed value for its Oklahoma taxable property at \$14,335,355.00. (J.A. 47).

In support of its allegation that the OTC valued its rail transportation system for 1981 at \$2,107,321,200.00, BN offered the district court handwritten notes of the Ad Valorem Tax Director. These notes were calculations of valuation based on net book cost less obsolescence and the necessary assessment percentage to arrive at or near the assessed value as calculated by the prescribed valuation, allocation and assessment procedures applied to all rail transportation systems in Oklahoma.<sup>1</sup> (J.A. 75 to 83).

The OTC, in answer to the complaint, admitted the existence of a valuation dispute. The OTC admitted BN's expert disagreed with the hypothetical true market value calculated by the OTC. The OTC moved to dismiss the complaint for lack of subject matter jurisdiction under §11503 and 28 U.S.C. §1341.

The district court ordered BN to file a statement of its jurisdictional facts in accordance with the holding in *Lennen*: that §11503 does not confer jurisdiction upon the federal district courts to maintain an action alleging a pure valuation dispute unless the railroad can make a strong showing of purposeful valuation with discriminatory intent. BN's statement of jurisdictional facts asserted that the OTC had

<sup>1</sup> These handwritten calculations preserved by the railroad tax representatives do not appear in any of the files and records of the Respondents. They are seriously inconsistent with the various official documents detailing the valuations and assessments of the BN's rail transportation property for 1979, 1980 and 1981. Attention is directed to BN's admission that these calculations were made at informal conferences between its tax representative and the Ad Valorem Tax Director. The calculations on these notes relied upon by BN before the district court and this Court, BN's Brief, pages 9 and 10, apparently reflect an acceptable valuation and an acceptable method of valuation, even though the cost approach is denounced by BN's expert, who relies solely on the income approach. These notes were not used to challenge the official 1981 assessment of BN's property. These handwritten calculations first surfaced in this litigation.

practiced systematic and intentional tax discrimination against railroads for many years; that the OTC assessed railroad property without regard to known conditions essential to a just determination or to proper valuation methodology and without principal reliance upon the income indicator of value; that the OTC manipulated valuations to perpetuate the statewide aggregate assessed valuation base; and, that any change in valuation methodology by the OTC was result-oriented, to maintain the tax base.<sup>2</sup> (J.A. 74 to 85).

Notwithstanding the artfully plead complaint and the voluminous discovery material filed by BN, the district court dismissed the complaint<sup>3</sup> for lack of subject matter jurisdiction under §11503, 28 U.S.C. §1341 and *Lennen, supra*. BN's Motion for New Trial was denied, the Court having considered the facts bearing on jurisdiction in the light most favorable to BN, announced that live testimony would have lent nothing to BN's abortive attempt to establish a prima facie case of intentional discrimination. (J.A. 127).

<sup>2</sup> These various arguments were involved in *Great Northern Railway v. Weeks*, 297 U.S. 135 at 151 (1936) (known economic conditions of the depression); *Norfolk & Western Railway v. Missouri State Tax Commission*, 390 U.S. 317 (1968) (disregard for a reasonable valuation formula, strong evidence tending to show mileage formula yielded grossly distorted results); *Sunday Lake Iron Company v. Township of Wakefield*, 247 U.S. 350 (1918) (14th Amendment protects against intentional, systematic undervaluation of other taxable property or something which amounts to an intentional violation of essential principle of practical uniformity); and *Chicago, Burlington & Quincy Railway Company v. Babcock*, 204 U.S. 585 (1907) (14th Amendment protects against fraud, arbitrariness or inequality resulting from a scheme or agreement among taxing officers). The United States Solicitor General suggests a jurisdictional test for §11503 similar to these arguments. A requirement of a strong showing of grossly distorted results or systematic discrimination is akin to purposeful overvaluation with discriminatory intent.

<sup>3</sup> Preliminary injunction was issued, allowing BN to pay \$484,258.04 of its 1982 ad valorem tax bill into the federal registry. Those funds have been disbursed and continue to be held by the various County Treasurers, not subject to expenditure under 68 O.S. 1981, §2467. The challenged taxes of 1983 remain in the federal registry.



The Court of Appeals for the Tenth Circuit affirmed. This Court granted a writ of certiorari to the Court of Appeals for the Tenth Circuit on October 20, 1986.

## 2. *The Opinions Below*

The district court, in its order dismissing the complaint, made findings of fact which are critical in the application of the legal and technical language of §11503.<sup>4</sup> The district court found that the dispute arises from the method used in Oklahoma to calculate railroad property values, hypothetical fair cash market value, for ad valorem tax purposes; that the true market value of railroad property is determined by a complex appraisal formula which uses factors of original cost depreciated and capitalized income; that the relative weights assigned to these factors have consistently changed to place emphasis on BN's favored capitalized income factor; and that the changes made by the State in 1982 were done so to achieve uniformity in the assessment process and compliance with §11503. The Tenth Circuit stated that BN did not allege any facts from which a trier of facts could infer discriminatory intent; that the State made changes in an attempt to comply with §11503 and to rectify prior problems; that if there were a pattern of prior overassessments (not overvaluations) it was broken in 1982; and, that BN's expert fee appraisal simply establishes that there was a difference of opinion as to the true market value of BN's rail transportation system.

A simple statement of the issue is: Should a federal court of equity interfere with the state's taxing

<sup>4</sup> The critical importance of these findings of fact is revealed in the legislative history discussed infra, particularly the Doyle Report 87-445 (1961), H.R. Rep. No. 94-725 (1975) and S. Conf. Rep. No. 94-595 (1976). The legislative history suggests that the target of §11503 is deliberate discriminatory assessing or taxing of rail transportation property. The courts below found only intent by the state to eliminate discrimination.

power simply because a railroad's expert appraiser disagrees with the state's valuation?

## 3. *Ad Valorem Taxation in Oklahoma* (J.A. 15 to 18).

In 1982, Oklahoma instituted changes in the ad valorem tax system to achieve uniformity. The various valuation methods were applied to all similarly situated taxpayers within a valuation class, such as railroad, airlines, distribution companies, transmission companies, telephone companies, etc. A single assessment percentage was applied in each assessment class: real, personal, rail transportation and public service corporation. *Cantrell v. Sanders*, 610 P.2d 227 (Okla. 1980), *McLoud Telephone Co. v. State Board of Equalization*, 655 P.2d 1037 (Okla. 1982). Equalization was ordered both inter and intra county for the assessed valuation of the property subject to assessment by the various county assessors. *Poulos v. State Board of Equalization*, 646 P.2d 1269 (Okla. 1982). These were the needed improvements in ad valorem taxation espoused by the railroads in the legislative history of §11503.

The Oklahoma Constitution, art. X, §8 requires all taxable real and tangible personal property be annually assessed at a value no greater than 35% of its fair cash value for its actual use and empowers the legislature to classify according to use to facilitate uniform assessment procedures; art. X, §21 creates a State Board of Equalization and mandates the Board to annually equalize the valuations of the several counties and to assess all railroad and public service corporation property; art. V, §59 mandates that the local millage (tax levies) be uniform upon all taxable property within the taxing jurisdiction; and, art. X, §9 prohibits the state from levying an ad valorem tax.

The Oklahoma Tax Commission is the state agency required to assist the State Board of Equal-

ization in both equalization of local assessments and valuation and assessment of railroad and public service corporation property. 68 O.S. 1981, §§2454 and 2462. The Oklahoma Tax Commission has supervisory duties over the various elected county assessors, 68 O.S. 1981, §2402 and it prepares an annual study of levels of assessment of property subject to assessment by the county assessors (sales-assessment ratio study which includes individual appraisals and mass appraisal comparables). This study is laid before the State Board of Equalization as a recommendation for equalizing property both within and among the counties according to valuation classes, residential, commercial, industrial and agricultural.<sup>5</sup>

The Oklahoma assessment process for local assessments requires three steps: (1) full value determination, (2) application of assessment ratio to determine assessed value, and (3) application of tax rate. *Cantrell v. Sanders, supra*. Local assessments are equalized at 12% with 3% deviation, or between 9% and 15%. *Poulos v. State Board of Equalization, supra*.

Railroad and public service corporation property assessments require five steps: (1) determination of system value, (valuation) (2) application of allocation factor to determine Oklahoma value, (3) application of assessment percentage to determine assessed value, (4) apportionment to the various local taxing jurisdictions, and (5) application of the tax rate.<sup>6</sup>

<sup>5</sup> Locally assessed residential and commercial and industrial real property is valued by a combination of the current value of the land and the replacement cost less depreciation of the improvements. Income approach has been unsuccessfully attempted to value income producing properties. Agricultural property is valued on a complex use formula based upon U.S. Corps of Engineers land survey statistics.

<sup>6</sup> In 1957, Oklahoma assessed at 100% of valuation. In 1958, the State Constitution was amended so that property may be assessed at no greater than 35% of its fair cash market value for its use. Okla. Const., art. X, §8.

In 1982 public service corporation property was assessed at 26% of its Oklahoma full cash market (use) value. This assessment percentage was unsuccessfully challenged in *McLoud Telephone Co. v. State Board of Equalization, supra*.<sup>7</sup> Also, in 1982, the three members of the Oklahoma Tax Commission acted to assure that all railroad and public service corporation property was valued according to the same valuation methodology for similar entities and that a uniform assessment percentage for each class, public service corporation and railroad, be applied by the State Board of Equalization to determine assessed value. (J.A. 31-35).

The 1982 valuation formula utilized to determine Oklahoma fair cash value of rail transportation property, going concern or unit valuation, included net book cost weighted at 60% and net rail operating income capitalized at 14% and weighted at 40%. This formula was a studied and deliberate attempt to place more weight on the railroads favored income approach, while reducing the level of assessment or assessment ratio.<sup>8</sup>

## SUMMARY OF ARGUMENT

BN's suit raises a fundamental jurisdictional issue inseparable from the principles of federalism and separation of powers. This suit asks the federal courts to interfere in the intricacies of Oklahoma's ad valorem tax system. The relief sought would require the district court to legislate a private system of valuation for ad valorem tax on BN. The injunctive

<sup>7</sup> Railroad property was not included in the classification of public service corporation property expressly because of §11503. (J.A. 33-34).

<sup>8</sup> J.A. 54, chart of reduction of assessed valuations; J.A. 50, 1981 assessment percentage (ratio) on railroads ranged from 19.75% to 8.25%, BN at 10.99%; J.A. 49, 1981 assessment ratios on railroads, mean 12.49, median 11.11; J.A. 52, Affidavit of David Ray Taylor explaining valuation methodology changes and 1980 progress report.



relief sought asks the court to enforce this private judicial legislation.

On writ, BN asks this Court to remand. This request masks BN's request to disregard the principle of comity. A remand would legislate a new cause of action in the federal district courts.

BN's claim of discriminatory overvaluation is not within the jurisdictional grant of §11503. Congress did not reject jurisprudence which forecloses use of the federal injunction to remedy excessive ad valorem tax valuation. *Railroad Tax Cases*, 92 U.S. 575 (1876). The outcome below of BN's overvaluation complaint was proper.

Section 11503 is an exercise of Congress's Commerce Clause powers. U.S. Const., art. I, §8, cl. 3. The statute limits state and local tax authorities and empowers the federal district courts to prevent violation of those limitations. The structure of §11503 separates the substantive provisions from the procedural provisions. Facially §11503 is far less than a general proscription of any ad valorem tax that results in discriminatory treatment of rail transportation property. Facially §11503 is far less than a general grant of equity jurisdiction to the federal district courts to prevent any state tax that results in discriminatory treatment of rail transportation carriers.

It is obvious, from a plain reading, the language of §11503 is technical and legalistic. Congress is presumed to have used this language in its technical and legal meaning with knowledge of the existing law. *Corning Glass Works v. Brenner*, 417 U.S. 188 (1974). Legislative history reaffirms the conclusion drawn from the careful usage in §11503: Congress intended to use each word in its technical, legal sense.

Congressional history requires a narrow application of both the substantive and the procedural provisions of §11503.

Legislative history identifies the acts within state taxation which Congress intended to proscribe: ad valorem tax equalization, or the lack thereof, which favors other non-rail, commercial and industrial property; or, the levy or collection of a tax rate on rail property higher than the tax rate on other commercial and industrial property. S.Rep. No. 87-445, H.R. Rep. No. 90-1483, S.Rep. No. 91-630 and H.R. Rep. No. 94-725.

Legislative history clearly identifies that Congress intended to prevent the states from imposing ad valorem tax burdens upon rail transportation property greater than that imposed upon other commercial and industrial property. Congress intended this proscription whether the greater tax burden was imposed either by *de jure* classification or by *de facto* equalization.

Legislative history identifies the purpose of the grant of jurisdiction to the federal district court: to provide a remedy where (1) the state court procedure is not adequate; (2) the state court jurisdiction can not be invoked before the tax is due; (3) or the state court remedy requires multiple suits. The legislative history reveals that Congress intended the federal district court to balance the harm to the state and the remedial needs of the rail carrier before taking jurisdiction or before issuing an injunction. S. Conf. Rep. No. 94-525, H.R. Rep. No. 94-725 and S.Rep. No. 92-1085.

Facially the procedural provisions limit federal court relief to equalization discrimination. The legislative history and the statute identify equalization discrimination in comparison to other commercial and industrial property. Judicial review is restricted



to that comparison measure or standard: the sales-assessment ratio study for commercial and industrial property.

Congress rejected overvaluation of rail transportation property as a proscribed act, S.Conf.Rep. No. 94-595; but did set the standard for judicial determination of the aggregate true market value of other commercial and industrial property; and expressly limited its grant of jurisdiction to prevent the proscribed acts. The statute and legislative history support the conclusion that true market value of rail transportation property is not subject to judicial review as an alleged violation of §11503 (b) (1), in the federal district courts.

Accordingly, Congress expressed serious restriction on the exercise of federal equity injunction in cases alleging violation of §11503. The *Lennen* jurisdictional rule is consistent with that Congressional intent.

This case does not involve any constitutionally protected private rights, nor does it involve a dormant commerce clause protection. This case does not compel constitutional interstitial decisional law. *Wardair Canada, Inc. v. Florida Department of Revenue*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 2369 (1986). Had Congress intended to set a national uniform valuation standard for ad valorem tax assessments of rail transportation property it would have done so. *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978).

Congress intended a very limited lifting of the proscription of 28 U.S.C. §1341 and it intended the continued application of the principle of comity in state tax cases. Legislative history clearly indicates Congress intended the federal district courts to cautiously entertain suits under §11503 to preserve our

system of federalism and avoid constitutional doubt. S.Rep. No. 92-1085.

## ARGUMENT

### I. FACIALLY §11503 IN TECHNICAL AND LEGAL LANGUAGE PROSCRIBES SPECIFIC ACTS WITHIN STATE TAXATION WHICH DISCRIMINATE AGAINST INTER-STATE COMMERCE AND VESTS EQUITY JURISDICTION IN THE FEDERAL DISTRICT COURTS TO PREVENT THOSE ACTIONS, NOTWITHSTANDING 28 U.S.C. §1341.

BN argues that §11503 is a later act and is intended to be a substitute for the general proscription of §1341. *Herman and MacLean v. Huddleston*, 459 U.S. 375 (1983), is inapposite. The starting point for statutory construction is the language. *Landreth Timber Co. v. Landreth*, \_\_\_ U.S. \_\_\_, 105 S.Ct. 2297, 2301 (1985). The language of §11503 expresses a restrictive lifting of §1341. And, the structure of §11503 affirms a careful separation of the proscribed acts from the federal court remedy.

Subsection (a) of §11503 defines assessment, assessment jurisdiction, rail transportation property and commercial and industrial property. These definitions engage technical and legal terms clearly indicating specialized meaning. These terms are used in both the substantive provisions and the procedural provisions. Definition for "true market value", the crux of this case, is omitted. Likewise "valuation" is not defined. Valuation is used in the definition of assessment, equating assessment with assessed value.

Subsection (b) also clearly indicates specialized meaning in its proscription. Clause (1) sets up an equation to measure the assessment ratio for rail

transportation property by the assessment ratio of other commercial industrial property. Facially this clause compares assessment ratios of the property of a single taxpayer to the aggregate property of an aggregate of taxpayers. This equation according to BN and the Eighth Circuit mandates the federal district courts to determine true market value of rail transportation property. *Burlington Northern Railroad Company v. Bair*, 766 F.2d 1222 (8th Cir. 1985). True market value was defined in the legislative history, in S.Rep. No. 91-630, H.R.Rep. No. 90-1483. These committee reports, at best, reveal Congressional frustration with the equation language.

Clause (2) proscribes the levy or collection of a tax on an assessment made in violation of clause (1). Clause (3) prohibits the levy or collection of a rate in excess of the rate imposed on other commercial and industrial property in the same assessment jurisdiction. Clause (3) does not limit the measure of a discriminatory tax rate to the taxing jurisdiction. Rather, it contemplates a larger jurisdiction, in Oklahoma either the county or the state, the assessment jurisdiction. This language indicates Congress did not intend to remove flexibility among the taxing jurisdictions in setting tax millage rates.

And, clause (4) prohibits the imposition of another tax that discriminates against rail carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of title 49. This language clearly prohibits imposition of a new tax which is discriminatory after the effective date of §11503. However, it does not prohibit collection of taxes which were in force and effect on the date of enactment of §11503. BN asserts this clause expresses, clearly and plainly, broad application of the entire section to prevent a state taxation which results in discriminatory treatment. Facially this clause is am-

biguous. *Richmond, Fredericksburg and Potomac Railroad Company v. Department of Taxation, Commonwealth of Virginia*, 762 F.2d 375 (4th Cir. 1985).

Subsection (c) expressly, but with limitation, lifts the jurisdictional bar of 28 U.S.C. §1341. In its grant of equity jurisdiction, twice Congress clearly expressed recognition of state jurisprudence. Federal court jurisdiction under §11503 is concurrent with other state or federal court jurisdiction, and limited only to prevent a violation of subsection (b). The federal district court is required to follow the heavy burden of proof required by state law. Exercise of this jurisdiction to grant affirmative relief to railroads aggrieved by the state's assessment ratio is limited: "Relief may be granted under this subsection only if the ratio. . ." This language prevents affirmative equitable relief in federal district court to railroads aggrieved by excessive tax rates or other taxes that discriminate. The evidentiary guidelines for exercise of this jurisdiction likewise directly related to the assessment ratio proscription of (b)(1). These evidentiary guidelines clearly, although technically, direct the equity court in determining true market value of other commercial and industrial property.

Careful scrutiny of the language of §11503 precludes broad judicial powers, permitting federal district court review of a single area of the ratio of other, nonrail, commercial and industrial property. Likewise, injunctive relief is permitted only for the purpose of equalizing the state's assessment ratio for rail transportation property of the aggrieved carrier downward to the judicially determined assessment ratio for the other property. The legislative history affirms that Congress was well versed on the lack of equalization by the states and the appropriate equalization tool, the sales-assessment ratio study. S. Rep.



No. 87-499, H.R. Rep. No. 90-1483 and S. Rep. No. 91-630.

## II. THE TECHNICAL AND LEGAL LANGUAGE OF §11503 REQUIRES CONSTRUCTION IN ITS TECHNICAL AND LEGAL SENSE.

The legal and technical statutory language does not, on its face, proscribe an excessive true market value. The substantive provisions focus on equality or uniformity in state taxation as between rail transportation property or carriers and other commercial and industrial property or taxpayers. *Richmond, Fredericksburg and Potomac Railroad Company v. Department of Taxation, Commonwealth of Virginia*, 762 F.2d 375 (4th Cir.1985). But the procedural provisions focus only on equalization of assessed values.

This technical and legal language, it is presumed, was used by Congress in its specialized meaning. *Hawley v. Diller*, 178 U.S. 476 (1900). Where Congress has used technical and legal words the statute must be interpreted in the specialized meaning, particularly if demonstrated by the legislative history. *Corning Glass Works v. Brenner*, 417 U.S. 188 (1974). Accord, *Bradley v. United States* 410 U.S. 605 (1973) and *Barber v. Gonzales*, 347 U.S. 637 (1954).

The plain meaning rule, appropriate in *Aloha Airlines Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7 (1983) is not enough in construction of §11503. As the Utah District Court noted in *Union Pacific Railroad Company v. State Tax Commission*, 635 F. Supp. 1060, 1067 (D.Utah, C.D. 1986), "Section 306 presupposes that there is such a thing as 'the true market value' of a given railroad, a single formula that in some way relates to reality." At note 10, the Utah court stated, "... So Congress's assumption that there is such a thing as 'the true market value' capable of quantification may itself be suspect."

Resort to the legislative history of §11503 and its precursors will assure proper application of this technical and legal language so as not to expand or contract this Commerce Clause exercise by Congress.

## III. THE LEGISLATIVE HISTORY OF §11503 AND ITS PRECURSORS EXPLICITLY AND IMPLICITLY EXPRESSES THAT CONGRESS INTENDED MINIMUM FEDERAL COURT INTERFERENCE WITH STATE TAX PRACTICES AND ONLY AS NECESSARY TO ENFORCE THE SUBSTANTIVE PROVISION OF §11503.

Section 11503 is void of any language that suggests a railroad may seek relief in the federal courts from the rigors of state or local ad valorem tax, without showing a serious advantage to other commercial and industrial property and a serious disadvantage to the railroad. Section 11503 is void of any language that suggests a railroad may acquire a serious advantage not enjoyed by all other railroads through individual valuation relief in the federal courts. And, §11503 is void of any language that suggests Congress intended the federal courts to set private, decisional valuation standards for the states.

After review of extensive legislative history, the Tenth Circuit in *Lennen* refused to apply §11503 to the unmentioned area of overvaluation of rail transportation. The *Lennen* decision did not construe the section as a complete lifting of §1341. It fashioned a jurisdictional rule to preserve the expressed purpose of Congress: to prevent intentional equalization discrimination against rail transportation property. The *Lennen* decision allows a railroad to maintain its §11503 action only to remedy deliberate ad valorem tax equalization discrimination. Such a fundamental jurisdictional test is not offensive to the con-



gressional purpose of §11503, and is supported by the legislative history.

In 1976, Congress was concerned with the bankrupt finances and deteriorating physical condition of our national rail transportation system. Congress did not consider ad valorem taxes a major cause of the crisis, nor an integral aspect of the cure. The decidedly discernible deliberate discrimination in ad valorem taxes *did* concern Congress.

Furthermore, in 1976, Congress explicitly decided that it did not recognize overvaluation within the proscribed discrimination. S.Conf. Rep. No. 94-595 and conference substitute for S.2718, 94th Cong., 2d Session (1976) Legislative History, Pub.L. No. 94-210.

With the economic crisis of the Northeastern railroads, railroad revitalization became urgent and imminent, which the 94th Congress dealt with in H.R.10979 and S.2718. Both bills contained a section on state tax discrimination. The language of each appears similar to the other. There was a critical difference, however, in the declaratory language:

H.R.10979

§601

Sec. 28(1) Any of the following *actions* by any state, or subdivision or agency thereof, *whether any such action be taken pursuant to a constitutional provision, statute or administrative order or practice or otherwise*, it is declared to constitute an unreasonable and unjust discrimination against, and an undue burden upon, interstate commerce and is forbidden and declared to be unlawful:

S.2718

§27 of the Interstate Commerce Act

Sec. 27(a) Notwithstanding the provisions of Section 202(b), any act described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It shall be unlawful for a State, a political subdivision of a State or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited *acts*:

BN argues that any tax practice which results in discriminatory treatment of a rail carrier is proscribed in §306 (§11503). The declaratory language of H.R. 10979 appears to support that claim.

The reported explanations of these two versions emphasize the serious divergence of the declaratory language. H.R.Rep. No. 94-725 on H.R.10979, and the conference committee reports, H.R.Conf.Rep. No. 94-768 and S.Conf.Rep. No. 94-595 explain H.R. 10979 as *prohibiting tax practices, including overvaluation*. Both conference reports rejected the House version. Neither S. Rep. No. 94-499 on S. 2718, nor the conference committee reports H.R.Conf.Rep. No. 94-768 and S.Conf.Rep. No. 94-595, explained S.2718 to prohibit tax practices or overvaluation.

S.Conf.Rep No. 94-595, accompanying the second conference committee substitute for S.2718, which was enacted as Pub. L. No. 94-210, in the Joint Explanatory Statement of the Committee of Conference, almost identical to the two earlier reports, above, summarized the antidiscrimination tax section in the Senate bill:

"The Senate bill made it unlawful for any State, political division, or entity acting on behalf of the State or subdivision to commit any of the following acts: (1) the assessment of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property bears to the true market value of such property in the same assessment jurisdiction; (2) the levy or collection of the tax on an assessment unlawful pursuant to levy or collection of the tax on an assessment unlawful pursuant to (1); (3) the levy or collection of an ad valorem property tax on transportation property at a rate higher than that generally applicable to commercial and industrial property in the same assessment jurisdiction; and (4) the imposition of any other tax which results in the discriminatory treatment of any common or contract carrier subject to the Interstate Commerce Act." pp. 165-166.

It also summarized the antidiscrimination tax section in the House Amendment:

"Part I of the Interstate Commerce Act was amended to include a new section making unlawful ad valorem State or State subdivision taxation activities. *Such prohibited tax practices included (1) overvaluation; (2) collection*

of an unlawful tax; (3) collection of any ad valorem property tax at a higher tax rate than the tax rate generally applicable to commercial and industrial property in the taxing district; or (4) the imposition of a discriminatory 'in-lieu tax'." p. 166. [Emphasis added]

Furthermore, it explained the conference substitute antidiscrimination tax section:

"The conference substitute follows the Senate bill except that the conferees deleted the provision making this section inapplicable to any State which had, on the date of enactment, a constitutional provision for the reasonable classification of property for State purposes and limited the provision to taxation of railroad property." p. 166.

Overvaluation as an administrative practice which constitutes unreasonable and unjust discrimination and an undue burden on interstate commerce was rejected in S.Conf.Rep. No 94-595. The more limited language of the Senate was adopted. Congress did not intend, with §306 of Pub.L. No. 94-210, to prohibit all administrative practices which result in discriminatory treatment.

S.Rep. No. 94-499 on S. 2718, explains the procedural provisions as allowing the carrier to seek an injunction before paying the disputed tax, because most state procedures require a carrier to pay the tax and then contest the collection; thus, the declaratory relief language of §306. The explanation of the procedural provisions in the two conference committee reports outline the statute, and explain that the jurisdictional grant is to remedy violations in the Section.

H.Rep. No. 94-725 on H.R.10979 94th Cong., 1st Sess. 1975, explained the need for federal district court jurisdiction.



"Railroad property tax discrimination has long been a well-recognized problem, but the procedural avenues of relief against it have not been adequate. Federal statutory law (28 U.S.C. 1341) prohibits the Federal courts from enjoining, suspending, or restraining the assessment, levy or collection of any tax under State law where a plain, speedy, and efficient remedy is available in the state courts. This provision has had the effect of closing the doors of Federal courts to railroads burdened by discrimination without giving them a "plain, speedy, and efficient" remedy under State law. The reason is that in many states suit must be brought against the tax collecting body instead of the tax assessing body. Where the county is the tax collecting body and a railroad operates in a number of counties, it must bring multiple suits to obtain relief. The Southern Pacific and its rail affiliates, as an example, had to bring 48 separate suits in 48 separate California courts to challenge the level of assessments of that railroad's property. There is no indication, under the Federal statute referred to above, of how many separate actions will be required before the Federal courts find that state remedies are not "speedy" and are not "efficient." In one decision, a district court found that 24 separate suits did not indicate a lack of adequate state remedy (*Chicago & North Western Ry. Co. v. Lyons*, 148 F.Supp 787 (1957)); in another case, the Supreme Court found the state remedy to be inadequate on the basis of the fact that 300 separate claims were asserted in 14 different counties, (*Georgia Railroad Co. v. Redwine*, 342 U.S. 299 (1952)). Relief from discrimination in the Federal courts is essential because railroads are located in numerous

standing jurisdictions and under state law may be required to bring numerous suits in various jurisdiction to obtain relief." pp. 76-77.

The 94th Congress did not find state courts inadequate. Rather, it found state procedures which require multiple suits by railroads to be inadequate. Thus Congress lifted §1341 to protect the railroads from the expense of multiple litigation. This is a procedural protection.

A review of the legislative history of the precursors to §306 of Pub.L. No. 94-210, §11503, further demonstrates that Congress did not intend the substantive provisions of §11503 to encompass claims of overvaluation, nor the procedural provisions as a remedy for all tax challenges.

The Doyle Report<sup>9</sup> is the genesis of §11503. It expressed concern as to the reaches of the Commerce Clause powers into state taxation, concluding that Congress may interfere with state taxing powers. The primary recommendation in the Doyle Report as to discriminatory state taxation was that railroad and pipeline right-of-way be exempted from all ad valorem taxation so as to remove the tax inequities among the interstate transportation carriers. An antidiscrimination tax statute was an additional and alternative recommendation offered to the Doyle Committee by the Association of American Railroads (AAR) as a result of the AAR's study on discrimination against railroad taxpayers subject to the same tax rates. The antidiscrimination tax language that the AAR recommended to the Doyle Committee was:

<sup>9</sup> Report of the Committee on Commerce, United States Senate by its Special Study Group on Transportation Policies in the United States, S.Rep. No. 87-445, 87th Congress, 1st Session, 1961, hereinafter Doyle Report.



"... declare the following action by any State, or governmental subdivision or agency thereof, whether such action be taken pursuant to a State constitutional provision, a statute, *an administrative practice, or otherwise*, to constitute an unreasonable and unjust burden upon interstate commerce and thereby forbidden and declared to be unlawful:

(a) The assessment, for the purposes of a property tax levied by any taxing district, of property owned or used by any common carrier engaged in interstate commerce at a value which bears a higher ratio to the true market value of such property than the assessed value of all other property in the taxing district subject to the same property tax levy bears to the true market value of all such property.

(b) The collection of any tax on the portion of said assessment so declared to be unlawful." Doyle Report, *supra*, p. 465. [Emphasis added.]

The AAR recommendation included injunctive relief in federal district courts, concurrent with the jurisdiction already conferred upon any federal or state court, notwithstanding 28 U.S.C. §1341 or the provisions of any state constitution or laws. The AAR explained the recommendation had "... the obvious merit of insuring that such carriers would receive equal treatment with other taxpayers subject to the same tax rates in accordance with applicable state laws"; and that, if enacted, such a statute would "... in no way alter(s) the freedom of the state to tax its taxpayers as in its discretion it deems best, as long as such carriers are accorded equal treatment with other taxpayers." Doyle Report, *supra*, p. 466.

The focus of the Doyle Report<sup>10</sup> in recommending this alternative remedial legislation was the deliberate lack of equalization of assessment percentages, based upon the AAR studies comparing the level of assessment, the average assessment percentage, of the aggregate assessed value of railroad property, to that of the aggregate assessed value of other property in the selected states. Additionally, the need for federal court jurisdiction to enforce this recommended remedial legislation as expressed in the Doyle Report through the AAR report was because of an inadequate or ineffective system of administrative and state court remedies to provide relief from this deliberate discrimination.

For the many bills<sup>11</sup> that were introduced in Congress during the fifteen (15) years following its issuance, the Doyle Report was used as the primer<sup>12</sup> on ad valorem taxation and the mischief of the local assessors' deliberate lack of equalization to the detriment of non-voting, investment intensified railroads and to the advantage of the voting property owners. Each of these bills dealt only with antidiscrimination, which Congress, after study by

<sup>10</sup> The Doyle Report contains a lengthy analysis of commerce clause jurisprudence; outline of ad valorem tax administrative procedures, valuation, allocation, assessment; detailed explanation of the unit valuation methodologies utilized by states; AAR's statistics demonstrating deliberate higher ad valorem tax burdens on railroads. The Doyle Report acknowledged the statistics were untested AAR statistics. However, by 1967 several states had conceded the deliberate higher tax burden. Transcript of Hearing on S.927, Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, 90th Cong. 1st Sess. (1967), p.8. The Doyle Report identifies the source of the discrimination as deliberate failure of the tax assessors to equalize for political reasons.

<sup>11</sup> H.R.7497 (1961), H.R. 736 (1964), H.R.4972 (1966), H.R.1480 (1967), H.R.16245 (1970), H.R.12891 (1974), S.2988 (1966), S.927 (1967), S.2289 (1969), S.2841 (1971), S.2362 (1971), S.3945 (1972), S.1891 (1973)

<sup>12</sup> The AAR witness testifying before various committees or subcommittees on antidiscrimination bills invariably requested that the Doyle Report be a part of the record of the hearings.

various committees and subcommittees and refinement of the language, turned its face against.

BN asserts §13(4) of Title 49 was the model for §11503, therefore §11503 must be construed broadly. The earlier committee reports often contained virtually verbatim sections of the written position advanced by AAR. Although review of those reports has not verified this assertion as to §13(4), that was the testimony presented in 1967.

James Ogden, representing the Association, appearing before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 1967, on S.927, testified that the language of S.927 follows the language of §13(4) of the Interstate Commerce Act in that it declares the described action by a state is unreasonable and unjust discrimination and undue burden on interstate commerce. The AAR testimony alone does not establish Congressional intent to measure state tax discrimination by reference to the objective economic impact of a state's actions rather than their purpose or intent. An economic impact test is certain to defeat taxes. Congress did consider economic impact of the proposed legislation, not only in terms of the amount of taxes paid by the railroads, but also in terms of local and state revenue losses. Letter from Department of Transportation, pp. 20-24, S.Rep. 91-630 (1969) 91st Cong., 1st Session to S.2289. Mr. Ogden's testimony is no basis for broad interpretation of the proscribed state act or federal court jurisdiction. There is no support for broad restriction on state taxation similar to broad authority of an administrative agency.

This earlier legislative history shows that throughout the fourteen (14) years between the Doyle Report and S.2718 of the 94th Congress, Congress was dealing with intentional and admitted discrimina-

tion. Upon inquiry, Congress was repeatedly told that the proposed antidiscrimination tax bill did not involve valuation. Congress was not asked to set a federal valuation standard for rail transportation property. Accordingly, Congress did not empower the federal courts to set private valuation standards.<sup>13</sup>

Neither Congress nor the AAR who promoted the antidiscrimination tax proposals ever intended to interfere with the states' valuation practices or that the federal district courts would determine valuation for the state. Recognizing the inferior authority of testimony, verbal or written, submitted in support or against proposed legislation, the following highlights lend insight to the congressional committees' struggle over the meaning of the AAR proposed language.

S.Rep. No. 90-1483, at p. 3, and S.Rep. No. 91-630, at p. 3, recites two ways in which discrimination can occur: higher assessment ratio or higher tax rate imposed upon interstate carriers. Testifying before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, in 1967, Mr. Ogden explains the purpose of the bill is to eliminate the dis-

<sup>13</sup> It is interesting that the AAR witnesses before various committees and subcommittees repeatedly advised that valuation of the railroads' property was not affected by its antidiscrimination tax proposal.

Tax Assessments on Common Carrier Property: Hearing on H.R. 736, 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess. (1964)

Tax Assessments on Common Carrier Property: Hearings on H.R. 4972 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong., 2d Sess. (1966)

Discriminatory Taxation of Common carriers: Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, 90th Cong., 1st Sess. (1967)

State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, 91st Cong., 1st Sess. (1969)



crimination. To the Chairman's query, "Doesn't your bill provide that a formula of assessment would have to be identical with respect to properties of a similar character?" Mr. Ogden: "No, Sir. Of course value is a measure or standard that would apply commonly for everything you value one kind of property by a different approach than another." p. 21. He further testified that the problem is how to persuade tax assessors to equalize and that as early as 1944, the existence of discrimination was due to a lack of equalization. Mr. Ogden testified that the equalization discrimination may be perpetuated by *de jure* classification. pp. 11 and 21. And, in support of S.927, Dr. Rolf A. Wiel, President, Roosevelt University, Chicago, Illinois, economics professor, submitted testimony that the techniques for valuing railroads are highly refined and that local assessments can be equalized by sales-assessment ratio studies. p. 66.

In reply to questions, in the transcript of Hearing Before the Subcommittee on Transportation and Aeronautics of the House of Representatives Committee on Interstate and Foreign Commerce, (1964), Mr. Ogden wrote that the proposed legislation did not have any bearing on valuation nor did it set a standard for determining value, and that it addressed narrowly defined existing discrimination which must be proved. In that written correspondence the issue was raised that the taxing jurisdictions might achieve the same resulting discrimination by substituting or adding other forms of taxation on railroads such as gross earnings tax. pp. 50-53.

The early committees studying the AAR's antidiscrimination tax bills attempted to define true market value and equalization, so as to avoid any question. H.R. Rep. No. 90-1483 and S. Rep. No. 91-630. These definitions, at best, constitute alarm on the part of Congress that the antidiscrimination tax

bills should not prohibit the state's valuation process. Those same committees were concerned that the proposal would require federal court interference with the state tax practices. To avoid expansion of the procedural provisions beyond equalization of admitted ratios, S. Rep. No. 91-630, stated:

"... S. 927 does not require or direct that the Federal judge perform the tax assessment or tax levying function.

"... the courts can and should construe this legislation to avoid any charge that a nonjudicial function is required to be performed. According to the professors' opinion there is nothing in S.927 which requires the Federal judiciary to go beyond its essential function of protecting rights given under Federal law." p. 12.

The overwhelming conclusion drawn from this early history is that Congress did not intend a broad proscription of ad valorem tax practices, nor a broad federal court remedy.

More recent history, S. Rep. No. 92-1085, 92nd Cong., 2d Sess., 1972, explained that federal court jurisdiction was needed to avoid the necessity of multiple suits in state courts and that the federal courts should balance the state's interest against the carrier's interest before relief is granted.

"... Second, the carrier would have to make the usual showing to obtain injunctive relief. Since the measure in essence grants equity jurisdiction to the courts, it is expected that the courts will balance the adverse impact on the community of any relief granted against the benefits to be derived by the carrier from such relief. The courts are capable of fashion-



ing remedies that are not burdensome to the communities involved." p. 8.

As BN advises, Pub.L. No. 94-210 was enacted to protect and preserve the economically failing national rail transportation system. Although unmentioned as a cause of the economic decline, §306 (§11503) was enacted to protect the failing rail transportation carriers from the payment of proportionally higher state and local ad valorem taxes deliberately imposed on property used in rail transportation than was imposed on property used in other commercial and industrial enterprises within the state and its political subdivisions. The Doyle Report identified the deliberate discrimination in state and local ad valorem taxation against rail transportation property and in favor of other property, conspicuously without recommendation that Congress set a valuation standard. Legislative history did not change that course. The refinement of the language came with the concerns expressed by Congress or at the invitation of Congress. These concerns related to states rights, states need for revenue, states authority to classify, as well as, what property should be the measure for ratio discrimination, what railroad property should be protected, what should be the standard of measurement and what power should the federal courts have. S.Rep. No. 92-1085.

Legislative history affirms that by rejecting the H.R. 10979 version of the antidiscrimination tax section Congress neither intended to, nor did it, vest equitable jurisdiction in the federal district courts to superimpose their valuation judgments upon those of the taxing authorities. The technical and legalistic language was used by Congress in its specialized meaning. Section 11503 should be construed narrowly to avoid expansion of the statute beyond Congressional intent and purposes.

IV. SECTION 11503 AND OUR SYSTEM OF  
FEDERALISM COMPELS APPLICATION  
OF 28 U.S.C. §1341 OR CONSIDERATION  
OF THE FUNDAMENTAL PRINCIPLE  
OF COMITY IN SUITS BROUGHT UN-  
DER §11503.

The Tenth Circuit decision in this case recognizes the proscription of 28 U.S.C. §1341, hereinafter §1341, and the need for judicial restraint consistent with the mandates of Congress and this Court.

The legislative history of §11503 invites the district courts to cautiously entertain claims of tax practices that result in discriminatory treatment. This history indicates Congressional intent to preserve the broad noninterference doctrine of §1341 except in limited cases where necessary to produce a speedy remedy to end the deliberate heavier tax burden imposed on rail transportation property. The history suggests Congress intended the federal courts to fashion a different "adequate, speedy and efficient remedy in state court" test, rather than an intent to completely except rail carriers from the §1341 proscription or the fundamental principle of comity.

The legislative history of §11503 indicates Congressional intent to preserve the broad noninterference doctrine of §1341. Limited situations are designated by H.R.Rep. No. 94-725 and S.Conf.Rep. No. 94-595 as warranting a grant of equitable relief to end deliberately discriminatory taxation of rail transportation property. Legislative history suggests that Congress intended a less rigorous test to determine presence *vel non* of an adequate, speedy and efficient remedy in state courts. Accordingly, specific mischiefs — multiple suits and offensive state procedures — have been removed by

§11503 from the general jurisdictional proscription of §1341.

In *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981), this Court acted to preserve the discretion of state taxing authorities. Accordingly, federal court jurisdiction will not be exercised to try the citizen's §1983 damage suit against state taxing authorities. In *McNary* noninterference is based not upon §1341, but upon the fundamental comity principle. The federal courts statutory prerogative to enforce the equal protection clause (§1983) may or may not override the broad jurisdictional proscription of §1341. Resolution of the latter issue does not dictate the *McNary* outcome. A more fundamental principle is decided: the transcendent utility of allowing to each state the power for independent management of its own fiscal affairs.

Section 11503 manifests a surgically precise Congressional intent to lift one corner of the jurisdictional ban set out at §1341. A broader reading of the legislation (§11503) risks infringement into state management of state fiscal affairs.

In §11503 Congress did not invite the railroads to litigate each dollar of ad valorem tax exposure before the federal courts. Nothing in §11503 is intended to disturb basic state-federal balance announced in *McNary* and underlying §1341.

Congress, like this Court, in *McNary*, intended to preserve the well-established and recognized jurisprudential principles of federalism. It did not intend §11503 to displace §1341. Principles of federalism compel recognition that a federal court may refuse to give its special protection to private rights when the exercise would be prejudicial to public interests. Even under §11503, a federal district court should exercise its discretionary power to grant or withhold

relief so as to avoid needless obstruction of the taxation policy of states.

The thrust of §1341, to remove from the federal courts subject matter jurisdiction to enjoin enforcement of a state tax where a plain, speedy and efficient remedy may be had in the state courts, is not defused by §11503. Legislative history suggests that federal court jurisdiction is available when offensive county by county litigation impedes the §11503 Plaintiff from acquiring a plain, speedy and efficient state court remedy. Greater reach cannot be demonstrated.

The *Lennen* decision is consistent with the decisional law in *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981) and *California v. Grace Brethren Lutheran Church*, 457 U.S. 393 (1982). *Lennen* recognized the continuing proscription of §1341, and the public policy problems attendant to unrestrained judicial intervention. Given its knowledge that the same issues were then pending in the BN protest before the Oklahoma State Board of Equalization, the Tenth Circuit Court of Appeals prudently affirmed the applications of *Lennen* and the continuing proscription of §1341 to the facts now before the Court.

The proper niche of §11503 is partially defined by jurisdictional principles presumptively known to those who reported on, drafted and passed this legislation.

Private rights are not enforced by federal courts of equity if such an exercise of jurisdiction is non-essential to or incongruent with an identified public interest. Thus the §1341 policy obtained in federal court even before passage of the act itself. *Matthews v. Rodgers*, 284 U.S. 521 (1932). The same underlying principle is statutory in *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976), *Rosewell v. LaSalle National Bank*, 450 U.S.



503 (1981), and *California v. Grace Brethren Church*, 457 U.S. 393 (1982).

Mr. Justice Brennan enunciates this compelling rule twice: *Perez v. Ledesma*, 410 U.S. 82 (1971), n.17 (J. Brennan concurring in part and dissenting in part); and, *McNary*, supra. p. 197, n. 27 (J. Brennan, concurring in judgment). Enactment of §11503 does not abrogate application of the reasoning of these opinions to the case at bar.

Broad interpretation of §11503 attributes to Congress an intent which is scarcely practical. Reading *Burlington Northern Railroad v. Bair*, No. 83-100-A (S.D. Iowa, July 16, 1986) (Pet. App. 43a) and *Burlington Northern Railroad v. Department of Revenue*, No. 8502102LE (D. Ore. May 6, 1986) (Pet. App. 77a) together with the broad construction of §11503 suggests an enormous judicial burden simply to standardize treatment of a hypothetical new body of intricate federalized railroad ad valorem tax valuation cases.

In the former action (*Bair*) and on remand from the Eighth Circuit, the district court, in 26 pages, waded through the components and subcomponents and interworkings of Iowa's unit valuation methodology and that of BN's expert. The court superimposed its judgment on that of each appraiser, producing a judicial formula for that railroad for that tax year. The Iowa opinion demonstrates that an impermissible level of federal judicial intrusion into state tax practices will necessarily flow from broad application of §11503.

An inevitable conflict of applicable opinions and destruction of uniformity of ad valorem taxation between rail carriers arises from consideration of the district court orders in Iowa, Oregon and Washington (Pet. App. 43a-80a). *Norfolk and Western Railway Company v. Missouri State Tax Commission*, 390 U.S.

317 (1968) offers no assurances that such intricate valuation issues will not be brought to the federal courts year after year.

This is the context in which BN substantially proposes that this Court legislate a federal cause of action sounding in discrimination whenever railroad experts differ in valuation methodology from a state tax assessor. This is the context in which BN proposes that §1341 has no application to the issues before the court.

The Ninth Circuit proposed a broad reading of the substantive provisions of §11503 and a restricted reading of the procedural provisions. In *Atchison, Topeka and Santa Fe Railway Company v. Board of Equalization of California*, 795 F.2d 1442 (9th Cir. 1986), the district court was directed to abstain because of mature state litigation. The court reasoned that the important remedial objectives of Congress required consideration of every form of *de facto* tax discrimination. The Ninth Circuit found support for its conclusion that the statute plainly required true market value to be a fact question in the procedural provisions. Then, the Ninth Circuit agreed with the Tenth Circuit that Congress intended the §1341 exception to be narrow and unintrusive, in support of abstention. The OTC herein is aligned with the Ninth Circuit's position on §1341. The difficulty in the Ninth Circuit's decision is illustrated by its abstention reasoning that the state has a strong interest in insuring that its officials accurately and fairly value and assess, and that the railroads pay their fair share of taxes contrasted with its broad reading of its power to hear valuation disputes. The Ninth Circuit's reasoning that Congress failed to set a valuation guide for rail transportation property because value will be calculated for one specific taxpayer and compared to an entire industry points to



the destruction of uniformity in the administration of ad valorem taxes on rail transportation.

The Eleventh Circuit, in *Southern Railway Company v. State Board of Equalization*, 715 F.2 528 (11th Cir. 1983), relying heavily on S.Rep. No. 91-630 and the Doyle Report, found that the legislative history together with the broad language of §11503 indicated a general Congressional concern with discrimination in any guise. The court stated that the legislative history evinces an intent of Congress to exempt railroads from the §1341 proscription and the principles of comity, equating §11503 to 28 U.S. 1362. *Moe v. Confederated Salish and Keotenai Tribes, Etc.*, 425 U.S. 463 (1976). In *Moe*, this Court gave preference to the broad jurisdictional grant in 28 U.S. 1362, rather than §1341. In *Moe*, this Court, citing *Department of Employment v. United States*, 385 U.S. 355 (1966), recognized the special treatment accorded under federal law to the tribes. Although the legislative history clearly indicates a desire to protect the railroad industry from discriminatory overburdensome taxation, nowhere does that history indicate special treatment similar to the tribes. In fact the history from the Doyle Report indicates the railroads want to and Congress intends for them to pay their fair share. S.Rep. No. 91-630 and S.Rep. 90-1483.

BN asserts applicability of *Aloha Airlines v. Department of Taxation of Hawaii*, 464 U.S. 7 (1983). *Aloha* came up through the state courts on a federal question. It involved no serious federalism issue as to jurisdiction of federal courts of equity. The federal statute proscribing state taxation did not require federal interference with state tax practices. *The Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744 (1961), partial invalidity issue was not involved.

BN's claim that overvaluation violates the substantive proscriptions of §11503 should be litigated

through the state courts as similarly situated state taxpayers alleging supremacy of a federal statute. *Memphis Bank and Trust Co. v. Garner*, 459 U.S. 392 (1983), *Aloha Airlines Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7 (1983) and *Wardair Canada, Inc. v. Florida Department of Revenue*, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 2369 (1986).

Oklahoma has adequate state court procedures to decide these issues. Even before a tax becomes due a taxpayer may seek declaratory judgment relief from constitutional infirmities. *Oklahoma Tax Commission v. Smith*, 610 P.2d 794 (Okla. 1980). 68 O.S. 1981, 68 O.S. 1981, §§2466 and 2469 provide single forum remedies for unreasonable valuation of rail transportation property. *Great Northern Life Insur. Co. v. Read*, 322 U.S. 47 (1944).

The Oklahoma remedies are certain, plain, speedy and efficient. Every taxpayer has the right to be fully heard and the right to a judicial determination which are the procedural criteria required by *Rosewell v. LaSalle National Bank*, *supra*. BN is not required to litigate in multiple jurisdictions in Oklahoma.

The OTC's motion to dismiss raised the absence of any allegations in the complaint that invoked jurisdiction under §11503. The motion to dismiss for lack of subject matter jurisdiction is not so intricately involved with the merits as to require trial. There is no statutory direction for procedure upon an issue of jurisdiction. The mode of its determination is left to the court. *Gibbs v. Buck*, 307 U.S. 66, (1939) and *KVOS, Inc., v. Associated Press*, 299 U.S. 269 (1936).

The power of Congress to limit state taxation is not at issue. *Northwestern States Portland Cement Company v. Minnesota*, 358 U.S. 450 (1959). The issues are: Whether Congress proscribed valuation prac-

tices of state ad valorem tax assessors?; and Whether Congress vested jurisdiction in the federal district courts to decide overvaluation claims? The principles of federalism compel the outcome below.

### CONCLUSION

This Court should affirm the order and judgment of the Court of Appeals.

Respectfully submitted,

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10  
No. 86-337

Supreme Court, U.S.

FILE

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**In the Supreme Court of the United States**

October Term, 1986

**BURLINGTON NORTHERN  
RAILROAD COMPANY,**

*Petitioner,*

**v.**

**OKLAHOMA TAX COMMISSION, et al.,**

*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

**BRIEF OF RESPONDENTS STATE BOARD  
OF EQUALIZATION OF THE STATE OF  
OKLAHOMA; GEORGE NIGH; SPENCER BERNARD;  
LEO WINTERS; JACK CRAIG; CLIFTON  
SCOTT; DR. LESLIE FISHER; AND MIKE TURPEN**

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## **QUESTIONS PRESENTED**

### **I.**

Whether Congress, in enacting 49 U.S.C. § 11503, intended to confer subject matter jurisdiction upon federal district courts to hear claims of overvaluation of railroad property.

### **II.**

Whether the language of 49 U.S.C. § 11503 is sufficiently clear with regard to valuation of railroad property to overcome the rule that the doctrine of comity bars federal intervention into a state taxation system.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1986

BURLINGTON NORTHERN	)	
RAILROAD COMPANY,	)	
	)	
Petitioner,	)	
	)	No. 86-337
v.	)	
	)	
OKLAHOMA TAX COMMISSION,	)	
et al.,	)	
	)	
Respondents.	)	

BRIEF OF RESPONDENTS STATE BOARD OF  
EQUALIZATION OF THE STATE OF OKLAHOMA;  
GEORGE NIGH; SPENCER BERNARD;  
LEO WINTERS; JACK CRAIG; CLIFTON SCOTT;  
DR. LESLIE FISHER AND MIKE TURPEN

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**STATEMENT OF THE CASE**

**INTRODUCTION**

The Attorney General of Oklahoma, Robert H. Henry, files this brief on behalf of the Respondents State Board of Equalization of the State of Oklahoma; George Nigh; Spencer Bernard; Leo Winters; Jack Craig; Clifton Scott; Dr. Leslie Fisher; and Mike Turpen, hereinafter referred to as "the State."

The primary issue before this Court is whether Section 306 of the 4-R Act<sup>1</sup> confers jurisdiction upon federal courts to consider railroad property valuation disputes. Changes in the federal-state balance are, however, not presumed, in the absence of clear legislative language indicating such an intent. Because no language in §306 clearly indicates an intent to confer railroad valuation jurisdiction upon federal courts, and because the Act's legislative history does not evi-

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<sup>1</sup> Section 306 will be used throughout this brief to refer to 49 U.S.C. §11503.



dence such a clear intent, it is appropriate that this Court hold that Congress did not intend to alter the federal-state balance by conferring railroad valuation jurisdiction upon the federal courts. Such a ruling by this Court would be consistent with the general principles of federalism and comity.

In valuing railroad property for property tax purposes, the State of Oklahoma first determines the value of the entire railroad as a unit, "unit valuation," then apportions a percentage of that value to be used by the state for tax purposes.<sup>2</sup> In valuing railroads as a unit, the State uses a complex appraisal formula which encompasses considerations of two major factors: the railroad's original cost depreciated; and the railroad's capitalized income (Pet. App. 8a). Since 1976, the relative weight given each of these two major factors has changed, with more emphasis consistently being placed on capitalized income ( *Id.* at 8a and 13a). As a result of this gradual change in emphasis,

<sup>2</sup> The Oklahoma process of local assessments requires three steps: (1) full value determination; (2) application of assessment ratio to determine assessed value; and (3) application of tax rate. *Cantrell v. Sanders*, 610 P.2d 227 (Okla. 1980). Local assessments are equalized at 12% with 3% deviation, or between 9% and 15%. *Poulos v. State Board of Equalization*, 646 P.2d 1269 (Okla. 1982).

<sup>2</sup> Railroad and public service corporation property assessments require five steps: (1) determination of system value; (2) application of allocation factor to determine Oklahoma value; (3) application of assessment percentage to determine assessed value; (4) apportionment to the various local taxing jurisdiction; and (5) application of the tax rate.

<sup>2</sup> An entity challenging its assessment may pursue administrative proceedings before the Equalization Board and may then obtain review of its decisions in the Oklahoma Supreme Court. *Tulsa Classroom Teachers Association v. State Board of Equalization*, 601 P.2d 99 (Okla. 1979); Okla. Stat. Ann. tit. 75, §§301- 326 (West 1976 & Supp. 1987).

<sup>2</sup> The Oklahoma Tax Commission is the state agency that assists the State Board of Equalization in both equalization of local assessments and valuation and assessment of railroad and public service corporation property. Okla. Stat. Ann. tit. 68, §§2454, 2255, and 2462 (West Supp. 1987).

and other factors, Burlington Northern's<sup>3</sup> annual assessment has fallen gradually, but consistently in every year since the current valuation system was adopted in 1976; in point of fact, as found by the trial court, the 1982 assessment was substantially less than the 1981 assessment, and indeed it was less than Burlington Northern's own assessment made in 1981 (Pet. App. 15a).

### THE PROCEEDINGS BELOW

Taking exception to their 1982, and later, their 1983 assessment, Burlington Northern sought relief in the United States District Court for the Western District of Oklahoma. In seeking such relief, Burlington Northern had no real quarrel with, and did not challenge, the tax rate imposed, the assessment ratio used, nor the valuation of other industrial and commercial property by the Tax Commission (Pet. App. 23a-35a). That is, Burlington Northern had no real complaint with the State's equalization. Rather, the true gravamen of the complaint was a challenge of the method used by Oklahoma to value the railroad as a unit. *Id.*

The State filed a response, acknowledging the existence of a honest valuation dispute, and a Motion to Dismiss the Complaint, alleging a lack of subject matter jurisdiction under either Section 306 or 28 U.S.C. §1341 (J. A. 4 and 11-25).

The district court ordered Burlington Northern to file a statement of its jurisdictional facts in accordance with the holding in *Burlington Northern Railroad v. Lennen*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984) (J. A. 65-66). *Lennen* held that Section 306 does not confer jurisdiction upon the fed-

<sup>3</sup> The Petitioner, Burlington Northern Railroad Company will be referred to in this brief as "Burlington Northern." The Respondents, as noted previously, will be referred to as "the State" unless specificity is needed.

eral district courts to entertain an action concerning a pure railroad valuation dispute, unless the railroad can make a strong showing of purposeful overvaluation, with discriminatory intent. *Id.* at 498.

In response, Burlington Northern filed a Supplementary Brief and Statement of Facts in Opposition to Motions to Dismiss Filed by Defendants (J. A. 63-86). Burlington Northern contended that they were intentionally discriminated against because changes in the State's assessment process caused an increase in the State's valuation of Burlington Northern's property.

The district court dismissed the complaint for lack of subject matter jurisdiction under Section 306, 28 U.S.C. §1341, and *Lennen* (Pet. App. 7a-17a). In dismissing the case, the district court found that railroad property in Oklahoma is now assessed at the same assessment ratio that is used to assess other commercial and industrial property (Pet. App. 13a).

In holding that there had been no intentional discrimination by the State, the district court found that had the Oklahoma Tax Commission been motivated solely by a concern for raising revenue, the State could have chosen not to assess commercial and railroad property at exactly the same rate, since the 4-R Act permits higher assessment of railroads, as long as the difference in assessment ratio does not exceed a 5% (Pet. App. 15a). In holding that the Oklahoma Tax Commission (OTC) had not been motivated by a concern for keeping the railroads aggregate assessment up, the district court found that if the OTC had been so motivated, it could have

eschewed the lower assessment ratio based on locally assessed commercial and industrial properties in favor of a higher assessment ratio, one which would take into account those properties which are centrally assessed. *In the interest of complying with the statute, the*

*OTC scrupulously chose to adopt the more conservative approach, despite the fact that the more profitable alternative has been found to be consistent with §11503.*

(Pet. App. 15a). (Emphasis added).

The district court also found that Burlington Northern's annual assessment had gradually fallen each year since 1976, and that Burlington Northern's 1982 assessment was substantially less than its 1981 assessment (Pet. App. 15a). The district court found that the 1982 assessment was even less than Burlington Northern's own self-made assessment for 1981 (*Id.*).

In addressing the changes in procedure which Burlington Northern argued reflected an intent to intentionally overvalue, the district court found that the changes did not reflect such an intent:

[T]he Court cannot agree that those changes reflect intentional discrimination against the railroads. *First, the utilization of a uniform assessment ratio* was mandated by federal statute and *in fact inured to the benefit of the railroads, as it brought a marked reduction in the assessment ratio* applied to railroad property. *Second, the change in weighting assigned to the valuation factors also benefitted the railroads, as by their own admission the railroads favor a valuation system based on capitalized income.* In 1982 greater weight was assigned to capitalized income than ever before. *Third, the discontinuation of assessment conferences, while facially unfavorable to the railroads, does not indicate intentional discrimination on the part of the Defendants.* The conferences were discontinued as part of an effort to insure uniformity of treatment in valuation, a purpose furthered by removal of



*the inherent nonuniformity of the negotiation process with individual railroad representatives. Finally, the deletion of economic obsolescence reductions does not suggest discrimination, as the reductions were also a product of individual negotiations. Although the absence of such a reduction might imply higher system value, in any event, the absence of the reduction does not imply higher system value in this case; despite the fact that no obsolescence reduction was allowed in 1982, Burlington Northern's Oklahoma value for 1982 was lower than that obtained with an obsolescence reduction in 1981. Thus, the Court concludes that the changes made 1982 do not reflect intentional discrimination on the part of the Defendants against the Plaintiffs.*

(Pet. App. 14a and 15a). (Emphasis added).

Finally, the district court held that since the Tenth Circuit in *Lennen* had decided that Congress, in enacting Section 306, "did not intend for the 'railroads to escape the general noninterference rule of [28 U.S.C.] § 1341. . . .'" (Pet. App. 10a), Burlington Northern "must therefore air their complaints concerning Oklahoma's valuation process in a forum provided by the State of Oklahoma." (Pet. App. 16a).

The Court of Appeals for the Tenth Circuit affirmed, holding that the issue was controlled by its previous decision in *Lennen*, and that "[w]ithout an express directive from Congress, we were unwilling to infer that it intended district courts to sit as state tax assessment boards for railroad property." (Pet. App. 2a).

The court also upheld the district court's finding that Burlington Northern failed to make an adequate showing of discriminatory intent, as required by *Lennen*. Upholding this finding, the Court of Appeals

noted that while the 1982 valuation figure used by the State was calculated differently as a part of a modified system of valuation, Burlington Northern's expert's proposed testimony merely established that there was a honest difference of opinion as to what the true market value was (Pet. App. 4a).

The court also noted that Burlington Northern had not alleged that it had been prevented from pursuing state administrative and court remedies to settle the valuation dispute (Pet. App. 5a, n. 1).

### SUMMARY OF ARGUMENT

Federal court adjudication of state valuation of railroad property would significantly alter the balance in the relationship between the federal government and the various states. This Court has long recognized that taxes are the lifeblood of government and that their prompt and certain availability is an urgent and pressing need of the states. Federal court review of railroad property valuation will have a particularly disruptive effect on the federal-state balance, because of the complex, time-consuming litigation necessary to adjudicate such issues, which will further delay the collection of payment of taxes, and because of the inexact nature of railroad valuation, which leaves much room for honest judgment calls on the state's part.

In our federal system, Congress is not deemed to have significantly altered the federal-state balance unless it clearly expresses its intent to do so. The 4-R Act, in addressing many of the railroad's problems, including their local taxation problems, conferred jurisdiction upon the federal courts to consider tax equalization in order to prohibit discriminatory treatment. The Act contains no language, however, which expressly or directly confers jurisdiction upon the courts to consider railroad valuation disputes. Rather, any conclusion that the statute conferred



such jurisdiction must, of necessity, be based upon inference and extrapolation, not upon a clear expression of intention. Because no clear expression of intention is present, it is appropriate that this Court find in favor of the State's position that no railroad valuation jurisdiction was conferred, as substantial changes in the federal-state balance, such as federal court review of railroad property valuation, are not properly inferred.

This is particularly true in view of the express provision of 28 U.S.C. §1341, which, in sweeping language, prevents federal injunctive intrusion into the "assessment, levy, or collection of any tax" where there is an adequate state law remedy.

Even an examination of Section 306's lengthy, fifteen year, legislative history does not evidence clear intent by Congress to confer railroad valuation jurisdiction upon federal courts. Rather, the history contains repeated assurances by the railroads sponsoring the Act that railroad valuation was not a problem and that the proposed legislation did not address itself to such issues.

The vast majority of legislative history relied upon by Burlington Northern consists of statements made by opponents of the Act, or by opponents of portions of the Act. As this Court has noted and held on many occasions, in interpreting a statute, reliance upon the views of the legislative opponents is dangerous and inappropriate. In their zeal to defeat a bill, opponents understandably tend to overstate its reach. Accordingly, the doubts and fears of a bill's opponents are not appropriately considered in its interpretation.

Even if, however, this Court were to find that it was the intent of Congress that federal courts, under the 4-R act, have jurisdiction to consider discriminatory overvaluation of railroads, there is nothing in the

Act to suggest that Congress meant to depart from the federal common law which requires that overvaluation, to be discriminatory, must be the product of intent or fraud. As there is no clear intent to change the federal common law expressed, such a change is not appropriately found. While the district court's ruling on intent was consistent with this federal common law, the State finds no support for the trial court's holding that there was any jurisdiction vested in the district courts to consider railroad valuation issues.

The holding of the Tenth Circuit, that a federal district court has no jurisdiction to hear a valuation dispute unless the railroad makes a strong showing of a purposeful overvaluation with discriminatory intent, goes further than Section 306 and 28 U.S.C. §1341 permit in allowing challenges to the valuation process. However, the State contends that the Tenth Circuit was correct in upholding the dismissal of the complaint, since Burlington Northern had only presented allegations that established the existence of a legitimate question concerning the actual market value of its property, and there was no showing of discriminatory intent.

Finally, because Section 306 does not clearly give federal district courts jurisdiction to issue injunctions against a state tax collection agency regarding disputes between railroads and the states over the valuation of railroad property, the doctrine of comity bars the relief sought by Burlington Northern. This Court has long recognized the potential disruption involved in allowing federal injunctive intervention in the revenue raising process of a state.

In *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981), where the taxpayer sought relief from alleged unequal assessment of real property, this Court held that the doctrine of comity

barred an action for damages. Comity has always been an important aspect of federalism, and has prevented federal court intervention in a number of state functions.

Since taxation is one of the most vital functions of state government, and is essential to the existence and stability of such, federal injunctive interference in this process should be rare, and undertaken only pursuant to a clear grant of Congressional authorization.

Also, Burlington Northern has not contended that state administrative and court procedures for challenging valuation procedure are procedurally inadequate, or that it has been prevented from pursuing this process. In view of the complex and specialized nature of valuation of railroad property, the state administrative process is the appropriate forum for resolving valuation disputes.

#### PROPOSITION I

SECTION 306 DOES NOT EVIDENCE A CLEAR AND UNAMBIGUOUS INTENT TO EMPOWER FEDERAL COURTS TO ADJUDICATE AND DETERMINE THE ACCURACY OF A STATE'S VALUATION OF RAILROAD PROPERTY.

A. EMPOWERING FEDERAL COURTS TO ADJUDICATE STATE VALUATION OF RAILROAD PROPERTIES WOULD SIGNIFICANTLY ALTER THE BALANCE IN THE RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND STATES.

The Tax Injunction Act, 28 U.S.C. §1341, reflects the fundamental principle of comity between federal courts and state governments that is essential to our

federalism. *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 103 (1981). As this Court noted in *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522 (1981), the Tax Injunction Act was "first and foremost a vehicle to limit drastically federal court jurisdiction to interfere with so important a local concern as the collection of taxes." Indeed, this Court has recognized that "taxes are the life-blood of government, and their prompt and certain availability an imperious need." *Bull v. United States*, 295 U.S. 247, 259 (1935).

In his separate opinion in *Perez v. Ledesma*, 401 U.S. 82, 127, n. 17 (1971), Mr. Justice Brennan discussed some of the reasons justifying the policy of federal nonintervention in state tax collection, stating:

The special reasons justifying the policy of federal noninterference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with a tax official are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damages to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency.

Because the valuation of railroad property is, by its very nature, complex, technical, and time consum-



ing, the adjudication of valuation is itself time consuming, costly, and could long delay the collection of taxes. As such, federal court adjudication of railroad valuation would materially interfere with state tax collection and thus materially alter the balance in the relationship between the federal government and the states.

**B. FEDERAL COURT REVIEW OF RAILROAD PROPERTY VALUATION IS PARTICULARLY DISRUPTIVE OF THE FEDERAL-STATE BALANCE, BECAUSE THE INEXACT NATURE OF RAILROAD VALUATION LEAVES MUCH ROOM FOR HONEST STATE JUDGMENT CALLS AND HONEST DISAGREEMENT.**

In discussing the difficulty of determining the value of railroad property, this Court has noted that because of its special nature, valuation is hardly exact:

But railroads, unlike farms and city lots and stocks and bonds, are not objects of exchange. The very notion of a "full cash value" for a railroad is in many respects artificial. See 1 Bonbright, *The Valuation of Property*, pp. 511-632. Whatever may be the pretense of exactitude in determining such a "value," to claim for it "scientific" validity, is to employ the term in its loosest sense.

*Nashville Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 370 (1940).

In a similar vein, this Court has observed that the valuation of railroad property is a matter of judgment, which is certainly not a matter of arithmetical calculation:

The ascertainment of the value of a railroad system is not a matter of arithmetical calcula-

tion and is not governed by any fixed and definite rate. Facts of great variety in number, estimates that are exact and those that are approximations, forecast based upon probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent — the actual value — of the property.

*Rowley v. Chicago & Northwestern Ry.*, 293 U.S. 102, 109 (1934).

A review of the order of the United States District Court in *Burlington Northern Railroad v. Bair*, No. 83-100-A (S.D. Iowa July 16, 1986) (Pet. App. 43a-70a), demonstrates the present complexity, inexactitude and room for judgment in valuing railroad property. In that case, the court was called upon, among other things, to determine the validity of the weight the state gave each of three valuation methods: the capitalized earning method, the stock and bond method, and the depreciated cost method. Noting that the parties had significantly different opinions as to the proper way to use the stock and bond method, the court found that both methods require the exercise of considerable judgment on the part of the appraisers (Pet. App. 48a). The court was also called upon to review the state's judgments on treatment of various complex matters such as the state's assumption that the deferred taxes will continue to grow and actually never be paid back (Pet. App. 50a), the proper adjustment of the income stream to reflect terms of current liabilities (Pet. App. 52a), and whether the price/earning multiples used adequately reflected the investor's total interest in stock, including risk, growth, earnings, as well as other factors that may apply to a particular industry and a specific company (Pet. App. 53a).



Authorizing federal courts to review such judgment calls and take corrective action, if the court does not agree with such judgment, would constitute a sweeping change in the relationship between the state and federal government. Such marked changes in federal-state relations are generally not found to be present unless the intent of Congress to bring about such change is clearly stated.

C. CONGRESS WILL NOT BE DEEMED TO HAVE SIGNIFICANTLY CHANGED THE FEDERAL-STATE BALANCE, UNLESS IT CLEARLY EXPRESSES ITS INTENT TO DO SO.

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In *United States v. Bass*, 404 U.S. 336, 349 (1971), this Court refused to broadly interpret a provision of the Omnibus Crime Control and Safe Streets Act, noting that a broad interpretation would significantly change the federal-state balance. This Court stated:

There is a second principle supporting to day's result: unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

(Footnote omitted).

More recently, in *Bowen v. American Hospital Association*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 2101 (1986), this Court applied this principle in determining whether, under the Rehabilitation Act of 1973, a Department of Health and Human Services Regulation dealing with health care to handicapped infants was authorized. Finding that Congress expressed no clear intent to au-

thorize federal supervision of treatment decisions traditionally entrusted to the state, this Court held that the regulation was unauthorized.

D. SECTION 306 DOES NOT EXPRESSLY OR DIRECTLY EMPOWER THE FEDERAL COURTS TO REVIEW THE STATE'S DETERMINATION OF A RAILROAD PROPERTY'S TRUE MARKET VALUE. ACCORDINGLY, A FEDERAL COURT'S POWER TO CONDUCT SUCH REVIEW WOULD, OF NECESSITY, HAVE TO BE BASED UPON INFERENCE AND EXTRAPOLATION. WHETHER SUCH INFERENCE OR EXTRAPOLATION WERE PROPER COULD ONLY BE DETERMINED BY EXAMINING BOTH THE STATUTORY LANGUAGE AND THE LEGISLATIVE HISTORY OF THE STATUTE.

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In the case at hand, the statutory interpretation urged by Burlington Northern would have a significant impact on the federal-state balance in an area of prime importance to the State -- taxation. The interpretation urged by Burlington Northern is not based upon clear statutory language, but rather is based upon inferences and extrapolation. This is particularly true in light of the clear command of 28 U.S.C. §1341, which expressly states that federal district courts "shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law" unless the state court remedy is inadequate. It should require much more explicit statutory language than that in Section 306 to lead to a conclusion that Congress intended to put the federal courts in the business of reviewing state valuation of railroad property, which by its very nature is inexact and requires the State to make many judgment calls.

In Section 306(2), Congress vested the district courts of the United States with jurisdiction, without regard to the amount in controversy or citizenship of the parties, and notwithstanding the provisions of the Tax Injunction Act, to “grant it mandatory or prohibitive injunction relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate *any acts in violation of this section*,” and providing for various exceptions. (Emphasis added). Burlington Northern relies on three provisions in Section 306, in arguing that federal courts are empowered to review the state’s valuation of railroad property:

1. The tax “ratio” provisions of subsection (1)(a);
2. The “burden of proof” provision of subsection (2)(d); and
3. The “any other tax” provision of subsection (1)(d).

Subsection (1)(a) prohibits property tax assessment of transportation property at a higher ratio to the true market value than the ratio which the assessed value of all the commercial and industrial properties, within the assessment jurisdiction, bears to the true market value of all such other commercial and industrial property. That is, subsection (1)(a) prohibits the property tax assessment of rail transportation property at a higher ratio than that used to assess all other commercial and industrial property in the same assessment jurisdiction.

Under the jurisdiction conferred by subsection (2), federal courts are thus required to compare the property tax assessment ratios (the percentage of true market value) at which the two categories of proper-

ties are assessed.<sup>4</sup>

The statute does not require or even speak of a review evaluation, or redetermination of rail transportation property valuations established by the State. Nor does the statute prescribe any means or methods of making such a redetermination. With respect to rail transportation property, the statute simply requires equalization of assessment ratios, not reevaluation or redetermination of value.

The statute’s only reference to review of valuation is in the area of “other commercial and industrial property,” the statute providing at subsection (2)(e) for the use of a random sampling method known as a “sales assessment ratio study,” to be conducted “in accordance with statistical principles applicable to such studies.”<sup>5</sup> Nowhere, however, does the statute establish the means for reviewing the value of rail transportation property.

Burlington Northern also argues that railroad valuation jurisdiction is conferred by virtue of the burden of proof provisions at Section 306(2)(d). The burden of proof provision at subsection (2)(d) simply provides that with respect to the determination of assessed and true market value, the burden of proof

<sup>4</sup> In conferring such jurisdiction, subsection (2) lists the conditions under which relief may be granted, Congress providing at subsection (e) of the subsection, that no relief may be granted under the section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5% of the ratio of assessed true market value, with respect to all of the commercial industrial property in the same assessment jurisdiction.

<sup>5</sup> A “sales assessment ratio study” compares the assessed value to the *actual sale price for a representative* and statistically valid sample of property within the assessment jurisdiction. See International Association of Assessing Officers, *Improving Real Property Assessment*, 122-55 (1978). The use of “sales assessment ratio studies” while applicable to commercial and industrial property, which frequently changes hands in the market place, is not applicable to railroad property, because, as this Court has noted, “railroads, from like farms and city lots and stocks and bonds, are not objects of exchange.” *Nashville Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. at 370.



shall be "that declared by the applicable State law." Burlington Northern's argument is that if the valuation of railroad property were not an issue to be determined independently by the federal courts, there would have been no reason for Congress to proscribe a burden of proof (Pet. at 18). As has already been noted, while review of the valuation of railroad property is not addressed by the statute, review of valuation of other "commercial and industrial property," by means of a "sales assessment ratio study," is contemplated by the statute. The burden of proof provision established the burden with respect to "other commercial and industrial property." Accordingly, Burlington Northern's argument that there would be no reason for Congress to have addressed the burden of proof, with respect to market and assessed value, unless railroad property valuation was an issue, is simply ill-founded, as the burden of proof provision is clearly applicable to issues related to "other commercial and industrial property."

Subsection (1)(d) of Section 306 prohibits the imposition of "any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part." Burlington Northern argues that Congress, in enacting this catchall provision, recognized the possibility of other methods of tax discrimination, implying that any discrimination in the valuation of railroad property would be covered under this provision, and therefore, subject to federal court jurisdiction (Pet. Br. at 17). Contrary to what Burlington Northern suggests, subsection (1)(d) does not prohibit every possible method of discrimination; it prohibits *other* taxes which discriminate. That is, the "any other tax" language encompasses other tax *not referred to in the three preceding subsections*, subsections (a), (b), and (c), all of which relate to ad valorem assessment and taxation of property. The catchall provision was meant to include other forms of tax-

ation, such as license taxes, gross receipt taxes and excise taxes.

In *Oglivie v. State Board of Equalization*, 492 F. Supp. 446, 454 (D.N.D. 1980) *aff'd.*, 657 F.2d 204 (8th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981), the court, in holding that the "any other tax" provision applied to the imposition of *personal* property tax, held that the phrase "*any other tax*" *obviously means a tax not referred to in the preceding subsections.*

Using a similar analysis, the court in *Alabama Great Southern Railroad v. Eaglerton*, 663 F.2d 1036, 1040 (11th Cir. 1981), held that the "any other tax" provision applied to licensing taxes. In so holding, the court, in part, relied upon *Gordon v. Appeal Tax Court*, 44 U.S. (3 How.) 133, 147 (1845). In that case, this Court was called upon to interpret the phrase "and any further tax" in a state tax exemption. In interpreting the statute, this Court stated:

"Not to impose any further tax or burden," when used in reference to some tax already imposed, means *no other tax besides that which reference is made.* Those words, so used, cannot be limited by a refinement upon the etymology of the word "any," out of or beyond the meaning in common discourse, to any like; and the words "any further tax," used with relation to some other tax, will, by common consent, as it has already been, be intended to *mean any additional tax besides that which is referred to and not any further like tax.*

(Emphasis added).

In context of Section 306, the "any other tax" provision cannot be read to authorize federal courts to review and redetermine state court evaluation of railroad property used for the purpose of *property tax* to



be levied, because property tax and ad valorem taxes are the type of taxes referred to in subsections (a), and (b), and (c), preceding the "any other tax" provision. Viewed as relating to "any other tax not referred to in the preceding subsections," the catchall provision cannot be viewed as providing further *property tax relief*, as property tax and ad valorem tax is referred to in the preceding sections.<sup>6</sup>

In sum, Section 306 does not, in clear unambiguous language, confer jurisdiction upon federal courts to review and redetermine the true market value which a state has established for railroad property. Any such intent must be inferred from statutory language, which does not directly address the issue. Construing the intent of Congress to materially alter the delicate balance in the relationship between federal and state government in an indirect manner, is not favored. A congressional intent to alter the federal-state balance is generally not to be inferred, but must be found to be clearly stated. Because there is great doubt as to whether Congress intended such a result, resort to legislative history is appropriate; an analysis

<sup>6</sup> Burlington Northern would have this Court believe that construing Section 306 as not including federal court review of the State's determination of railroad property true market value, would leave railroads with no remedy, if their property was in fact overvaluated. Such, however, is not the case; railroads have state administrative and court remedies available to them. See discussion at Proposition V, *infra*. Additionally, in cases in which such administrative and court remedies prove to be other than plain, speedy and efficient, federal courts under the provisions of 28 U.S.C. §1341 would have jurisdiction to intercede. The record below simply does not demonstrate, nor is it alleged, that the administrative and state court remedies available to Burlington Northern in the area of valuation are not plain, speedy, or efficient.

of that history, as discussed in Proposition II, strongly militates against concluding that Congress intended such jurisdiction to be conferred.<sup>7</sup>

<sup>7</sup> In *Cass v. United States*, 417 U.S. 72 (1974), this Court was called upon to interpret the provisions of a federal statute which provided for readjustment pay for armed forces reserve officers being relieved from active duty. The statute in question [10 U.S.C. §687(a)] provided for such pay after service of "at least five years of continuous active duty." The statute also contained a "rounding off clause for those serving more than four and a half years, but less than five years." The question before the Court was whether the rounding off clause was applicable in determining eligibility, as well as in computing the amount of pay. In holding that the legislative history of the statute made it clear that the rounding provision applied only to computing amounts of pay, and not to determine eligibility, this Court commented upon the use of legislative history:

[P]etitioners contend, that resort to legislative history is unnecessary and improper.

Our view is to the contrary. The rounding provision is arguably subject to the interpretation given it by petitioners, but did Congress intend that provision to override as an explicit requirement of "at least" five years of service? We think the answer to that question is sufficiently doubtful to warrant or resort to extrinsic aids to determine the intent of Congress, which of course is the controlling consideration in resolving the issue before us. Moreover, the court has previously stated that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which prohibits its use, however clear the words may appear on 'superficial examination.'"

. . . . Such aid is available in this case and we decline to ignore the clear relevant history of Section 687(a).

*Id.* at 76-79. (Footnote omitted).

In the case at hand, Burlington Northern argues that Congress, in prohibiting the taxation of rail transportation property at a higher ratio than other industrial commercial property, requires review and redetermination of rail transportation property valuation. The language of the statute leaves it sufficiently in doubt as to whether Congress intended such a result. Resort to available legislative history to resolve such doubt is, as was held in *Burlington Northern Railroad v. Lennen*, *supra*, appropriate.

## PROPOSITION II

THE LEGISLATIVE HISTORY OF SECTION 306 DOES NOT EVIDENCE A CONGRESSIONAL INTENT TO VEST FEDERAL COURTS WITH JURISDICTION OVER RAILROAD VALUATION DISPUTES. RATHER, THE SECTION'S LEGISLATIVE HISTORY DEMONSTRATES THAT THE RAILROADS REPEATEDLY TOLD CONGRESS THAT RAILROAD PROPERTY OVERVALUATION WAS NOT A PROBLEM, AND THAT THE RAILROADS' PROPOSED BILLS DID NOT ADDRESS THAT ISSUE OF RAILROAD PROPERTY VALUATION.

Since the issuance of the "Doyle Report" in 1961,<sup>8</sup> Congress has addressed itself to a variety of complex problems facing the American railroads. One of many problem areas addressed was in the area of local taxation. For a period of fifteen years, Congress studied the various proposals drafted by the American Railroad Association dealing with local taxation, ultimately addressing the issue in Section 306 of the 4-R Act.<sup>9</sup>

Many hours of testimony and hearings, as well as reports dealing with the matter, demonstrate that Congress spent a great deal of time and effort grap-

<sup>8</sup> Special Study Group on Transportation Policies in the United States, Senate Comm. on Commerce, National Transportation Policy, S. Rep. No. 445, 87th Cong., 1st Sess. (1961).

<sup>9</sup> The various bills addressing this topic were: H. R. 7497, 87th Cong., 1st Sess. (1961); H. R. 786, 88th Cong., 1st Sess. (1963); H. R. 4972, 89th Cong., 1st Sess. (1965) (together with twelve other identical bills); S. 2988, 89th Cong., 2d Sess. (1966); S. 927, 90th Cong., 1st Sess. (1967); H. R. 1480, 90th Cong., 1st Sess. (1967); S. 2289, 91st Cong., 1st Sess. (1969); H. R. 16245, 91st Cong., 2d Sess., (1970); S. 2841, 92nd Cong., 1st Sess. (1971); S. 3945, 92nd Cong., 2d Sess. (1972); S. 1891, 93rd Cong., 1st Sess. (1973); H. R. 10979, 94th Cong., 1st Sess. (1975); S. 2718, 94th Cong., 1st Sess. (1975).

pling with the railroads' local taxation problems.<sup>10</sup>

An examination of Section 306's fifteen year legislative history reveals two recurring themes which are important to the consideration for the Court:

1. Railroad property overvaluation was not a problem; and
2. The proposed legislation did not concern itself with railroad valuation, but rather dealt with equalization, which was the railroad's problem.

These recurring themes in the legislative history strongly militate against the railroads' position that Section 306 deals with railroad valuation and confers jurisdiction upon federal courts to address railroad valuation issues.

In July, 1964, in one of the very first hearings to consider proposed legislation dealing with railroad taxation, Mr. James Ogden, Vice President and General Counsel of the Gulf, Mobile, and Ohio Railroad

<sup>10</sup> The following hearings and reports of the House and Senate dealt with the railroads' local taxation problems: *Tax Assessments on Common Carrier Property: Hearing on H.R. 736, H.R. 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 2d Sess. (1964); *Tax Assessments on Common Carrier Property: Hearings on H.R. 4972 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. (1966); *Discriminatory Taxation of Common Carriers: Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. (1967); S. Rep. No. 1483, 90th Cong., 2d Sess. (1968); *State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. (1969); S. Rep. No. 630, 91st Cong., 1st Sess. (1969); *Common and Contract Carrier State Property Tax Discrimination: Hearing on H.R. 16245, and related bills Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. (1970); *Surface Transportation Legislation: Hearing on S. 2363, Surface Transportation Act of 1971 and S. 1092, etc. Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 92nd Cong., 1st Sess. (1971, 1972); S. Rep. No. 1085, 92nd Cong., 2d Sess. (1972); S. Rep. No. 595, 94th Cong., 2d Sess. (1976).



Company, speaking on behalf of the Association of American Railroads, informed Congress that the principal problem facing railroads in the area of local taxation was not valuation of railroad property, but rather discriminatory equalization. Vice President Ogden stated:

*The principal problem in the matter of railroad assessments is not one of how to value a railroad. In the hundred-year history of railroad taxation, the practice of valuing railroads for tax purposes has reached a substantial degree of refinement. Though not as simple as valuing a one-family dwelling, the method is neither incomprehensible nor even overly complicated. And it should be remembered that no greater effort is required to assess a railroad fairly and reasonably than is required to assess one unfairly and unreasonably. The real problem is to determine how much of the valuation that has been found should be assessed, which, in turn, depends upon how much of the valuation of other property is assessed. In other words, the problem is how to get the tax assessors in the several States to equalize the railroad's assessment with that of other property in the same taxing district.*

True equalization requires that each parcel of property be assessed at a figure which is the same proportion of its full value as the assessment of every other parcel of property in the same taxing district is of its full value.

Railroad assessments are not equalized fairly and reasonably in numerous instances. Many tax assessors simply cannot or will not equalize railroad assessments with the assessments

of other property even though both kinds of property are subject to the same tax levy. . . .

*Tax Assessments on Common Carrier Property: Hearing on H.R. 736, H.R. 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess. 18-19 (1964). (Emphasis added).*

Some five years later, Phillip M. Lanier, counsel for Louisville and Nashville Northern Railroad Company, speaking on behalf of the Association of American Railroads, again informed Congress that *valuation was not the railroads' problem*, but that equalization was. In response to various questions from Senator Hanson regarding the basis on which railroad property was valued, Mr. Lanier first informed the Senator that the valuation formula varied from state to state, and was quick to add that valuation was not the railroads' problem, indicating that equalization was:

MR. LANIER: The formula varies from State to State and we are not dealing with the valuation question. This is not our problem. We speak only of the equalization of the tax rate.

*State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, 91st Cong., 1st Sess. 39 (1969). (Emphasis added).*

The next year, in June of 1970, Mr. Lanier once again appeared, this time before a House committee, indicating again that the railroads' problem was in the area of equalization, not valuation, this time adding that the proposed legislation did not deal with valuation:

MR. LANIER: *On the valuation — this bill would not deal with valuation being standard.*



*The standards and methods of valuation that any State wishes to use would be totally unaffected by this legislation.*

The short answer, if I may give it this way, and I think it will be clear, is that for valuation purposes different kinds of property put to different uses do require different methods of valuation. And the method of valuation applied to a railroad is quite different from that which is applied to a residence, a farm, factory, whatever it may be.

And that is appropriate because it is the way to get at the real value. There is nothing in this legislation — and we have no brief here to alter that — it is only in the area of equalization of the computed value that this legislation speaks. That is where our problem is.

*Common and Contract Carrier State Property Tax Discrimination: Hearing on H.R. 16245, and related bills Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 138 (1970). (Emphasis added).*

Then, in response to question from Representative Brock Adams, Mr. Lanier indicated that the proposed legislation "would come into play" after valuation was done:

MR. [Brock] ADAMS [Representative from the State of Washington]: On page 2 of the bill it says, "The assessment" — which is what the tax collector comes in on — "for purposes of a property" — and that is all I am talking about here now — "owned or used by a common carrier at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other

property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all other such property."

That appears to me that you are taking into account both valuation and assessment.

Mr. LANIER: I think I can answer it this way.

Without regard to this legislation, assuming it is enacted, without regard to it the assessing authority for the railroads puts a value — a fair market value, true market value, the words means the same — on that railroad property and *the local assessor in the towns you refer to puts a true market value on the residences. After that is done, this bill would come into play.*

*Id.* at 139. (Emphasis added).

Finally, Mr. Lanier, using an example of a lot valued at \$5,000.00, and one valued at \$20,000.00, explained to Representative Adams what the railroads were seeking, indicating that *all the bill calls for is equalization of assessment, not equalization of valuation.*

MR. ADAMS: But that help could not — if, for example, vacant property in that area with no buildings on it was assessed at, we will say, 100 by 100 lot, would be assessed at \$5,000 — with a building on it, of course, valuation is going up — so then if your railroad property was assessed at more than that, under this bill — this is what I am asking you — I think you probably would have an automatic lawsuit that would say the value of a piece of real property with two rails on it and no other improvements should not be any higher than ei-

ther vacant property plus the value of the rails.

Unless, of course, you are using this unitary system that you mentioned which would take into account a lot of other factors, and since Mr. Smith is talking about real property and assessment and the bill, I am just asking you how it works.

MR. LANIER: Let us assume that the vacant lot is assessed at \$5,000. That is a fair market value of that lot. Now, in Washington the equalization ratio is 50 percent.

MR. ADAMS: In Washington it is 50 percent. There is a fight going on because nobody is assessing at 50 percent. In some counties it is 20 and in others it is 32 and in others it is 56. If you have a lot of lumber in a particular county, a lot of trees, you get a low assessment rate —

MR. LANIER: Let's take the 50 percent then, so that the vacant lot actually carries a tax on \$2,500. Now let us assume that a portion of the right-of-way of the railroad equivalent in area in that town to the vacant lot carries a value, fair market value determined by the State assessing authority of \$20,000, if it is equalized at 50 percent, the tax goes against only \$10,000. *That is all this bill requires, and that is all we ask for.*

*Because we are speaking in terms of uniformity of the equalization ratio, not uniformity of the result in dollars of value or in dollars of tax, but only that once the fair market value is determined, the equalization ratio will be the same. And since you would have a 50 percent ratio in each instance, we would have abso-*

*lutely no complaint and no grounds for complaint.*

*Id.* at 139. (Emphasis added).

Mr. Lanier was not the only railroad representative who told Congress the proposed legislation did not deal with valuation. In 1967, appearing before a committee of the United States Senate, Dr. Harold M. Groves, appearing on behalf of the railroads and supporting the legislation, stated that he thought much of the railroads' local taxation problem grew out of imperfections in the equalization process, indicating that the proposed legislation dealt with that process, and not valuation or the apportionment. Dr. Groves stated:

*Some of the discrimination against railroads is deliberate, but I believe much of it is de facto growing out of imperfections in the equalization features of property tax laws. The proposed legislation may not be broad enough to eliminate all discrimination, but it would make a good start in eliminating that part of it which is procedural . . . .*

*. . . . . Railroads have a vital stake in three aspects of property tax: fair valuation; fair apportionment; and fair application of rates. The first two involve difficult conceptual problems, but the last (with which this proposed legislation deals) is a matter of simple integrity.*

*Discriminatory Taxation of Common Carriers: Hearings on S.927 Before the Subcomm. on Surface Transportation of the Senate Comm. of Commerce, 90th Cong., 1st Sess. 54 (1967). (Emphasis added).*

These statements and testimony of railroad representatives indicating that railroad property valuation was not part of their local taxation problems, and that



the proposed legislation did not deal with valuation, were taken by other participants in the legislative process as a statement of the railroad's position that they were not seeking passage of the legislation in order to confer jurisdiction upon federal courts to deal with valuation issues. For example, in his letter to Chairman Friedel, Charles Otterman, Chief Counsel for the California Board of Equalization, stated:

It also appeared to me that what the railroads were saying is that they wanted to have discriminatory assessment ratio practice struck down by the federal courts and that it was not their intention to intrude the federal courts into fact of adjudication as to the true market value of railroad property and local assessed property for the purpose of assessing.

*Common and Contract Carrier State Property Tax Discrimination: Hearing on H.R. 16245, and related bills Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 93 (1970).*

In a similar vein, the Multistate Tax Commission, in its letter to Senator Vance Hartke, stated in their resolution that:

*In view of the stated position of the carriers that they have never supported the bill in hopes of using it to bring a pure valuation case in the federal courts, the question of true market value of carrier property should not be a subject for federal court action under the bill.*

*State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, 91st Cong., 1st Sess. 111 (1969). (Emphasis added).*

Echoing the railroad representatives' comments, the Senate Report on Senate Bill 927 repeated that the use of true market value in the statute was not meant to establish a standard for determining value, indicating that the statutory standard was one to which values that had already been determined must be compared. The report provided at Appendix B:

The proportion of "true market value" at which assessments are finally fixed varies among the several States. In some States the law requires assessment at true market value, in others at 60 percent thereof, in other at 35 percent, et cetera.

Railroad property in most of the States is valued and assessed as a unit; that is, the whole system as it exists in 8, 10, or 15 States is valued; this value is distributed among the several States on the basis of recognized allocation factors; and then, in turn, the value in a particular State is apportioned among the several taxing districts in that State on the basis of mileage. In other words, when railroads are assessed as a unit the total value is first determined by adding the assessed value of individual items that make up the railroad plant.

As to the few States in which railroad property is locally assessed there is no specific information concerning the assessment methods.

*S. 927 does not suggest or require a State to change its assessment standards, assessment practices, or the assessments themselves. It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other. It is not a standard for determining value; it is a standard to which values*



*that have already been determined must be compared. This standard is "true market value" (also the generally accepted standard for assessment purposes) and the requirement is that carrier property be assessed at the same proportion of such value as the proportion at which all other property subject to the same tax rates is assessed.*

S. Rep. No. 1483, 90th Cong., 2d Sess. 10 (1968) (Emphasis added).

The above legislative history demonstrates that those who proposed and supported the legislation, the nation's railroads and their Association, and those appearing on their behalf, repeatedly told Congress that valuation of railroad property was not a problem, and that the proposed legislation did not address railroad property valuation. Despite this, the railroads would have this Court believe that Congress, in its role as problem solver, addressed a problem that they were told did not exist.

In support of this position, Burlington Northern asks this Court to look, not at the statements and testimony of those who supported the legislation, but rather at the statements of those who opposed it (Pet. Br. at 25).<sup>11</sup>

<sup>11</sup> In addition to the statements of opponents of the bill, Burlington Northern, in one instance, relies upon the testimony of Broley E. Travis (Pet. Br. at 25, n. 38). Mr. Travis, a retired California tax assessor hired by the railroad to testify in support of the legislation, expressed no opinion as to the intent of Congress. Rather, he indicated that as a technician, examination of assessment would have to start his evaluation. There is little or no reason to assume that Congress adopted Mr. Travis' technical view, particularly in light of the Committee's report (S. Rep. No. 630, 91st Cong., 1st Sess. (1969)), which indicated that "true market value" as used in the bill was not meant to be a standard for determining value, and referred to the value determined by the state assessor. In point of fact, the court in *Burlington Northern Railroad v. Lennen*, 573 F. Supp. 1155, 1162-63 (D. Kan. 1982), *aff'd*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984), found that the Committee had rejected Mr. Travis' technical view.

This Court has observed, reliance upon the views of opponents of legislation, in interpreting a statute, is misplaced and unreliable:

*[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt."*

*NLRB v. Fruit & Vegetable Packer*, 377 U.S. 58, 66 (1964). (Emphasis added). See also *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203, n. 24 (1976) [objections to a draft version of § 10(b) of the Securities and Exchange Commission Act of 1934, 15 U.S.C. § 78; (b), by representatives of the securities industry who opposed the statute were "entitled to little weight."].

The statements of those supporting Section 306 indicated that valuation was not part of their local taxation problem, but that equalization was. The sponsors of Section 306 further indicated that the proposed legislation did not address valuation of railroad property. It is extremely doubtful that Congress, apprised of these facts, intended that Section 306 conferred jurisdiction upon federal courts to address railroad valuation issues. The proponents of the bill asked for no such relief; Congress has expressed no clear intent to grant such relief; and the legislative history contains no plain indication that such was Congress's intent. On the contrary, the comments and testimony of those sponsoring the legislation, the nation's railroads, strongly militate against such an interpretation.

### PROPOSITION III

EVEN IF SECTION 306 WERE HELD TO ENCOMPASS OVERVALUATION DISCRIMINATION, HONEST DISAGREEMENT OVER RAILROAD PROPERTY VALUATION DOES NOT CONSTITUTE DISCRIMINATION. RATHER, UNDER FEDERAL COMMON LAW, OVERVALUATION MUST BE FRAUDULENT OR INTENTIONAL TO SUPPORT A CLAIM OF DISCRIMINATION.

In *Rowley v. Chicago & Northwestern Railway*, 293 U.S. 102, 111 (1934), the Chicago & Northwestern Railway Company brought suit in federal district court against several Wyoming county treasurers, asking the federal district court to enjoin collection of part of the taxes levied upon their railroad property. Wyoming law required that all taxable property be assessed on the basis of its actual value. The railroad's complaint rested upon the allegation that the state had overvalued their property. This Court, holding that the railroad had not proven its discriminatory claim, held that to support a claim of discriminatory overvaluation, the railroad must show that overvaluation of its property was intentional or, the equivalent of fraudulent purpose:

There is nothing in this record to suggest any lack of good faith on the part of the board. *Overvaluation resulting from error of judgment will not support a claim of discrimination. There must be something that amounts to an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principles of uniformity.*

293 U.S. at 111. (Emphasis added).

See also *Great Northern Railway v. Weeks*, 297 U.S. 135, 139 (1936), and *Charleston Federal Savings &*

*Loan Association v. Alderson*, 324 U.S. 182, 190-91 (1945).

This Court reached similar results in *Chicago Great Western Railway v. Kendall*, 266 U.S. 94, 98-99 (1924) ("It is not enough, in these cases, that the taxing officials have merely made a mistake. It is not enough that the court, if its judgment were properly invoked, would reach a different conclusion as to the taxes imposed. See also *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 447 (1923); and *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 353 (1917).<sup>12</sup>

Congress, in enacting Section 306, is presumed to have knowledge of the law, both statutory and decisional, *Director v. Perini North River Associates*, 459 U.S. 297, 319 (1983) ("We may presume 'that our elect representatives, like other citizens, know the law. . . .'"); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know

<sup>12</sup> In attempting to persuade the court that intention need not be shown in order to prove discriminatory overvaluation, amicus curiae, the United States, relies on four recent decisions of this Court, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-71 (1984); *Washington v. United States*, 460 U.S. 536, 544 (1983); *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 397 (1983); and *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n. 15 (1981). None of these cases are controlling, as none of these cases are discriminatory overvaluation cases. The *Bacchus* case deals with an excise tax exemption which was found to constitute "economic protectionism," and found to be discriminatory in both purpose and effect — discriminating in favor of local products. The *Washington* case dealt with the propriety of imposing a sales tax on a federal government contractor; and the *Clover Leaf Creamery* case dealt with the propriety of a Minnesota statute prohibiting the retail sale of milk in plastic nonreturnable nonrefundable containers, while permitting such sales in other nonreturnable, nonrefundable containers, such as paperboard milk cartons. The *Memphis Bank* case dealt with whether a state sales tax imposed on interest earned by a bank on various federal obligations is proper in light of the federal government's constitutional immunity from taxes. None of these cases dealt with discriminatory overvaluation of property for tax purposes, and cannot be said to have changed the federal common law in such area.



the law; . . . "); and *Cary v. Curtis*, 44 U.S. (3 How. 236, 240 (1845)) ("Such was the law as announced from this Court, and Congress must be presumed to have been cognizant of its existence; . . . they must be supposed to have been equally cognizant[sic] of the effects and tendencies of this court's decisions upon the collection of public revenue.").

Thus, in enacting Section 306, Congress was presumed to have been aware of the common law that overvaluation, absent intention or fraud, does not constitute discrimination. Any intent to modify or alter this common law cannot be presumed, as statutes in derogation of common law are strictly construed, and not presumed to alter common law. *E.g.*, *Herd & Co. v. Karwill Machinery Corp.*, 359 U.S. 27, 304-05 (1959) ("Any such rule of law, being in derogation of the common law, must be strictly construed, for '[n]o statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.' "); and *Ross v. Jones*, 22 Wall. 576, 592 (1874).

#### PROPOSITION IV

EVEN IF SECTION 306 GIVES A FEDERAL COURT JURISDICTION TO ENTERTAIN CERTAIN CLAIMS OF OVERVALUATION WITH DISCRIMINATORY INTENT, THE HOLDING OF THE TENTH CIRCUIT THAT THE MATERIALS PRESENTED BY BURLINGTON NORTHERN DID NOT PRESENT A LEGITIMATE ISSUE UNDER SECTION 306, AND THAT DISCRIMINATORY INTENT WAS REQUIRED BEFORE A FEDERAL COURT HAD JURISDICTION TO CONDUCT A HEARING OVER A VALUATION CLAIM, IS CONSISTENT WITH CONSTITUTIONAL JURISPRUDENCE REGARD-

#### ING DISCRIMINATION.

Burlington Northern also complains that the district court and the Tenth Circuit erred when it ruled that the case should be dismissed because of the failure of Burlington Northern to set forth sufficient facts that would justify invoking the court's jurisdiction under Section 306.

As noted previously, the State contends that there is nothing in the statutory language of Section 306 or its legislative history to support the view that this statute was intended to grant federal courts jurisdiction to hear claims alleging overvaluation with discriminatory intent. However, even if such jurisdiction existed, Burlington Northern failed to allege or present facts which would constitute discrimination sufficient to invoke such jurisdiction.

The Tenth Circuit held that the federal district court had jurisdiction of a claim that a railroad property was being taxed with a different assessment percentage than other similar commercial property. That court also reaffirmed its holding in *Burlington Northern Railroad v. Lennen*, 715 F.2d at 498, stating that a federal district court could hear also a claim regarding valuation if the railroad made a strong showing of a purposeful overvaluation with discriminatory intent (Pet. App. 3a).

The Tenth Circuit stated that since Burlington Northern did not allege knowledge of any state officials' remarks regarding an intent to discriminate in valuation, or any procedure that on its face demonstrated valuation discrimination against railroads, the complaint had been properly dismissed (Pet. App. 3a).

Both the district court and Tenth Circuit found that Burlington Northern proposed to do nothing more than dispute the method used to determine



Burlington Northern's system value (Pet. App. 4a; 13a-17a). The Tenth Circuit observed that Burlington Northern's 1982 assessment was calculated differently than previous figures as a part of a new system, and that its expert's testimony simply established there was merely a difference of opinion over what the true market value was (Pet. App. 4a). That court held that, "[v]iewed in the light most favorable to Burlington Northern, the materials presented established the existence of a legitimate question over the actual market value of Burlington Northern property, but not a legitimate question regarding overvaluation with discriminatory intent." (Footnote omitted) (Pet. App. 5a).

The Tenth Circuit's ruling set forth the test for evaluating a claim pursuant to a motion for summary judgment. Fed. R. Civ. P. 56; *Celotex Corporation v. Catrett*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 2548 (1986). This is the appropriate standard when material that supplements a motion to dismiss has been considered. Fed. R. Civ. P. 12(b).

Furthermore, objective evaluation of public officials' intent is preferable when subjective inquiry into those persons' motives would have significant societal costs. See *Harlow v. Fitzgerald*, 457 U.S. 800, 816-20 (1982).

The rule of *Lennen* regarding intent is also consistent with equal protection jurisprudence under the Fourteenth Amendment. In *Personnel Administration of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979), this Court held that "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional only if that impact can be traced to a discriminatory purpose." See also *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to

show a violation of the Equal Protection Clause") and *Washington v. Davis*, 426 U.S. 229 (1976).

The Court in *Arlington Heights*, 429 U.S. at 265, noted that this principle was well-established in a variety of contexts, citing *Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973) (schools); *Wright v. Rickerfeller*, 376 U.S. 52, 56-57 (1964) (election districting); and *Akins v. Texas*, 325 U.S. 398, 403-04 (1945) (jury selections). See also *Batson v. Kentucky*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 1712 (1986) (in criminal case where black jurors were pre-emptorily excused, question was whether "in these cases, as in any case alleging a violation of the Equal Protection Clause, was whether the defendant had met his burden of proving purposeful discrimination on the part of the State.").

Significantly, in *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981) one of the claims was that taxpayers who successfully appeal their property assessments were specifically targeted for reassessment the next year. *Id.* at 106. As noted previously, this Court held that none of the taxpayers' allegations stated a claim under 42 U.S.C. § 1983.

Therefore, in light of the evidence Burlington Northern sought to present, the State contends that the Tenth Circuit was correct in holding that Burlington Northern was not entitled to a hearing on its contentions.

## PROPOSITION V

THE INTERPRETATION OF A CONGRESSIONAL GRANT OF FEDERAL DISTRICT COURT JURISDICTION MUST BE VIEWED AGAINST THE BACKDROP OF FEDERALISM; IN THE ABSENCE OF A CLEAR AND EXPRESS GRANT OF FEDERAL JURISDICTION, PRINCIPLES OF COMITY BAR INJUNCTIVE RELIEF AGAINST STATE REVE-

## NUE OFFICIALS.

Burlington Northern contends that Section 306 grants a federal district court jurisdiction to issue an injunction against a state tax collection agency to resolve disputes between railroads and the State overvaluation of railroad property.<sup>13</sup> The State responds that in view of the unclear language of Section 306, the principles of federalism, the judicial precedents of this Court, previous legislation by Congress, and the Eleventh Amendment<sup>14</sup> such an extreme use of federal judicial power and its attendant intrusion into a vital state governmental function is not justified, and is barred by the doctrine of comity.

<sup>13</sup> In *Atchison, Topeka and Santa Fe Railway v. Board of Equalization*, 795 F.2d 1442, 1446 (9th Cir. 1986), cited by both the Petitioner and the Solicitor General in support of their position before this Court, the Ninth Circuit held that §11503 "authorizes federal district courts to hear claims of specific instances of overvaluation. . . ." (Emphasis added).

<sup>14</sup> The Eleventh Amendment, while not a bar to the present action, has relevance since it was intended to prevent an entity from using a federal court to sue a state. *Hans v. Louisiana*, 134 U.S. 1 (1890). The Eleventh Amendment is a principle of sovereign immunity which is a constitutional limitation on the federal judicial power established in U.S. Const. art. III. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984).

Generally, a suit is against a sovereign "if the judgment sought would expend itself on the public treasury or domain, or "interfere with the public administration." " *Pennhurst*, 465 U.S. at 101, n. 11.

Under the Fourteenth Amendment, Congress has the power to abrogate Eleventh Amendment immunity. *Pennhurst*, *Id.* at 99. But, although there was a shift in federal-state balance caused by the enactment of the Fourteenth Amendment, see *Fitzpatrick v. Bitzer*, 427 U.S. 445, 454-55 (1976), the present case does not present such a case since it arises under the Commerce Clause, and not the Fourteenth Amendment.

Furthermore, while *Ex parte Young*, 209 U.S. 123 (1908) held that a state official may be enjoined to prevent unconstitutional actions, "the theory of *Young* has not been provided an expansive interpretation." *Pennhurst*, 465 U.S. at 102. Also, this Court in *Pennhurst* noted that while the *Young* doctrine rests on the need to promote the vindication of federal rights, "the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Id.* at 105.

## A. THE PRINCIPLE OF COMITY AS SET FORTH IN *FAIR ASSESSMENT IN REAL ESTATE V. McNARY* PREVENTS A FEDERAL COURT FROM ENJOINING STATE TAX OFFICIALS AND SETTING THE STATE TAX BURDEN OF A CORPORATION WITHOUT A CLEAR CONGRESSIONAL DIRECTIVE AUTHORIZING AN INTRUSION INTO SUCH AN IMPORTANT FUNCTION OF A SOVEREIGN.

Judicial interpretation of the intent of Congress in enacting Section 306 must be viewed in the context of long standing federal principles. The starting point of this inquiry is this Court's decision in *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981).

In *McNary*, this Court held that a taxpayer's action for damages under 42 U.S.C. § 1983, alleging unconstitutionality in the administration of a state tax system, was barred by principles of comity. The taxpayer had contended that there was a difference in the tax assessment of property, depending on whether it had new improvements on it. The majority opinion rejected the argument of the dissent that it was 28 U.S.C. § 1341 that prohibited the action. The Court stated that federal court deference in state tax matters was not limited to § 1341, because "the principle of comity which predated the Act was not restricted by its passage." *Id.* at 110. See also *Younger v. Harris*, 401 U.S. 37, 44 (1971), where this Court held that notions of comity were even a more vital consideration than principles of federal equity jurisdiction in restraining federal courts from interfering in criminal prosecutions.

The Court in *McNary* quoted *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522 (1981), which noted



that § 1341 was a vehicle to limit federal court interference "with so important a local concern as the collection of taxes." 454 U.S. at 110. See also *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976) and *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943). In *Rosewell*, the Court noted that "it was a longstanding rule of federal equity to keep out of state tax matters as long as a 'plain, adequate and complete remedy' could be had at law." 450 U.S. at 525.

In *Great Lakes* the Court stated that rules of federal equity require that a federal court cannot grant declaratory relief when the state legislature has provided a state mechanism for recovery of the tax. 319 U.S. at 300-01. The Court held that a taxpayer could not obtain a declaratory judgment regarding the validity of the tax, despite the fact that § 1341 speaks only of injunctive relief. *Id.* at 299.

Tax collection is vital to the existence and stability of local government. Obviously, expenditures of state government are totally dependent upon the revenue gathering apparatus. If federal courts are required to sit as "state assessment boards," *Burlington Northern Railroad v. Lennen*, 715 F.2d 498 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984), regarding "specific instances of overvaluation," *Atchison, Topeka and Santa Fe Railway*, 795 F.2d at 1446, the interference with state government is apparent.

In *Lynch v. Household Finance Corp.*, 405 U.S. 538, 542, n. 6 (1972), a case involving the interpretation of 28 U.S.C. §1343(3) jurisdiction, this Court, after discussing previous Supreme Court decisions and two affirmances of dismissals of constitutional challenges to the collection of state taxes, brought pursuant to § 1343(3), stated:

All of these cases involved constitutional challenges to the collection of state taxes. Congress has treated judicial interference

with the enforcement of state tax laws as a subject governed by unique considerations and has restricted federal jurisdiction accordingly: [cites 28 U.S.C. § 1341]. We have repeatedly barred anticipatory federal adjudication of the validity of state tax laws. *Dows v. City of Chicago*, 11 Wall. 108; *Matthews v. Rodgers*, 284 U.S. 521; *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293; see also, *Perez v. Ledesma*, 401 U.S., at 126-127, n. 17 (opinion of Brennan, J.). The decisions cited by appellees may, therefore, be seen as consistent with congressional restriction of federal jurisdiction in this special class of cases and with longstanding judicial policy.

In *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981), cited previously, this Court cited *Dows v. Chicago*, 11 Wall. 108, 110 (1871), quoting Justice Fields' description of what this Court called "the vital and vulnerable nature of the state tax systems," as follows:

"It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public."

454 U.S. at 102.

In *Rosewell v. LaSalle National Bank*, 450 U.S. at 525, n. 33, the Court noted that "even where the Tax Injunction Act would not bar federal-court interference in state tax administration, principles of federal



equity may nevertheless counsel the with holding of relief."

Significantly, in *Rosewell* the Court held that 28 U.S.C. § 1341 involved a cutting back of federal equity jurisdiction. *Id.* at 526. Therefore, the cases of *Dows v. Chicago*, *supra*, *Matthews v. Rodgers*, 284 U.S. 521 (1932), and *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), all of which emphatically reject federal equity involvement in state tax matters where an adequate state remedy exists, are relevant to the present case.

Potential disruption of state governmental affairs by federal courts has always been a concern of this Court. See *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 58 (1973) and *Milliken v. Bradley*, 433 U.S. 267, 291 (1977).

This concern is greatest when the intrusion is by the use of federal injunctive power. In *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) the Court, in holding that a federal court had no jurisdiction to enjoin the police from using chokeholds in absence of a real and immediate threat, noted:

In exercising their equitable power federal courts must recognize '[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.

*Id.* at 112.

See also *Rizzo v. Goode*, 423 U.S. 362 (1976) and *O'Shea v. Littleton*, 414 U.S. 488 (1973).

The State in the present case contends that the injunctive relief contemplated by Burlington Northern holds the potential for the disruption of its tax collection operation.<sup>15</sup>

*Lyons*, *Rizzo*, and *O'Shea* were actions brought pursuant to the Ku Klux Klan Act of 1871, 42 U.S.C. §1983. All three concerned alleged violations of constitutional rights that involved practices that both the Fourteenth Amendment and 42 U.S.C. §1983 were designed to protect citizens from. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); and *Monroe v. Pape*, 365 U.S. 167 (1961). As noted previously, 42 U.S.C. § 1983 clearly provides for equitable relief.<sup>16</sup> Since this Court has held that the principle of federalism restrains the use of federal injunctive relief in matters involving personal liberties, the same principle should guide the Court in determining whether the ambiguous statute at hand, 49 U.S.C. § 11503, should be available to propel federal courts into railroad valuation cases.<sup>17</sup> *Cf. Edwards v. California*, 314 U.S. 160,

<sup>15</sup> The present case involves the 1982 valuation of the Burlington Northern's railroad property. A similar suit challenging the 1983 assessment has been stayed by the same court pending the outcome of this case. *Burlington Northern Railroad v. Oklahoma Tax Commission*, No. 83-419-R (W.D. Okla. Apr. 29, 1985) See J.A. 125-29. On December 16, 1986, Burlington Northern and two other railroads filed another action in the same court. Burlington Northern alleged that its 1986 assessment had been overvalued by 45.1% *Burlington Northern Railroad v. Oklahoma Tax Commission*, No. 86-2726-W (W.D. Okla. Dec. 16, 1986).

<sup>16</sup> 42 U.S.C. § 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, *suit in equity*, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." (Emphasis Added).

<sup>17</sup> 42 U.S.C. § 1983 cannot be used to enjoin the practices mentioned above despite the fact that it is an exception to the Anti-Injunction Act, 28 U.S.C. § 2283. *Mitchell v. Foster*, 407 U.S. 225 (1972).

177 (1941) (Douglas, J., concurring) (“[T]he right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.”); and *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938).

In *Burlington Northern Railroad v. Lennen*, 715 F.2d at 497, the Tenth Circuit noted that there is an “absence of specific statutory direction” in Section 306. The lack of clarity as to the extent of federal court jurisdiction regarding the assessment of railroad property makes federalism principles particularly significant. “[W]hen a statute is ambiguous, ‘construction should go in the direction of constitutional policy.’” *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974). *Cf. Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 14, n. 10 (1983) [the Court notes that “unambiguous” proscription in 49 U.S.C. § 1513(a) compelled Court to conclude that federal statute was intended to preempt state taxation statute].

In his amicus brief the Solicitor General contends that “Congress plainly intended the unusual degree of interference with the ordinary administration of state property tax collection that Section 306 by its terms authorizes.” (Br. at 23). Therefore, the Solicitor General concedes that if his position regarding federal equitable jurisdiction is sustained, interference will be extensive. The Solicitor General attempts to show that the intrusion can be minimized by such devices as random-sampling and does not require “tedious item-by-item investigation” (Br. at 24-25). However, the statute does not contain such limitations, and the reference to such in Section 306(c) concerns nonrailroad commercial and industrial property.

Furthermore, another so-called minimalization factor referred to by Burlington Northern, the 5% ratio in Section 306(c) (Pet. Br. at 21; see also Solicitor

General’s Brief at 25), would not stop railroads from asserting excessive valuation claims.<sup>18</sup>

Disputes over valuation could well be reduced to arguments over the value of each individual asset of a railroad, as well as disagreements over a variety of other issues, such as types of depreciation or the weight to be given various methods of valuation. In the present case Burlington Northern’s valuation of its system differed dramatically with the valuation of such by the State (Pet. App. 31a-32a).

If Burlington Northern’s position were adopted, the value of the railroad property would be determined by a federal judge after listening to expert witnesses from each side.<sup>19</sup> Therefore, an unelected, life-appointed federal judge could act as an assessor using his or her equitable powers to set the state tax burden of each railroad operating in a state. *Cf. Moses Lake Homes v. Grant County*, 365 U.S. 744 (1961). It is hard to imagine a process more at odds with the principles of American federalism.<sup>20</sup>

The State contends that the Tenth Circuit and the district court’s holdings in the present case and the Tenth Circuit’s previous reasons in *Lennen*, are what Congress intended in enacting Section 306. Both courts noted that in 1982 the State equalized assess-

<sup>18</sup> As noted previously, (p. 45, n. 15) Burlington Northern is contending in a new federal lawsuit that its 1986 tax assessment was 45.1 higher than it should have been.

<sup>19</sup> Burlington Northern concedes in its brief that its interpretation of §11503 “authorize[s] federal court fact finding as to true market value.” (Pet. Br. at 18). See also *Burlington Northern Railroad v. Bair*, 766 F.2d 1222, 1225-26 (8th Cir. 1985).

<sup>20</sup> Another important consideration is that, if valuation challenges would be allowed, the time and energy of state tax officials would be consumed by the defending of their valuation process. This Court has found that social costs such as these are relevant in determining the scope of 42 U.S.C. §1983. See *Mitchell v. Forsyth*, \_\_\_ U.S. \_\_\_, 105 S.Ct. 2806, 2815 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982).



ment percentages, and is now using the same assessment ratio on railroad property, 10.87%, as is used to assess other commercial and industrial property in Oklahoma (Pet. App. 4a and 13a). *Cf. Oglivie v. State Board of Equalization*, 657 F.2d 204 (8th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981) (court upholds the district court determination that personal property of the railroads should be exempt from taxation and be subject to an assessment ratio of 13.24%, which is the way other commercial and industrial property were treated); and *Arkansas-Best Freight System, Inc. v. Cochran*, 546 F. Supp. 904, 909 (M.D. Tenn. 1981) (Tennessee taxing statutes requiring a higher assessment rate to be applied to motor carrier property than the rate applied to commercial and industrial property generally violated 49 U.S.C. § 11503a, which is virtually identical to Section 306).

In *Moses Lake Homes v. Grant County*, 365 U.S. 744, 752 (1961), the Court held that where a county assessed taxes against leasehold estate of lessees of the federal government on the basis of the full value of the buildings and improvements, while other leaseholds were assessed at full market value, the taxes were discriminatory. This Court held that the Court of Appeals' ruling directing the district court to decree a valid tax, for the invalid one the State had tried to exact, was improper, stating:

Federal courts may not assess or levy taxes. Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one.

*Id.* 752. See also *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 385 (1960) (while a state cannot discriminate against federal govern-

ment or its lessee regarding taxation, the state's power to classify is extremely broad and its discretion is limited only by constitutional rights and by the doctrine that a classification may not be palpably arbitrary).

B. SINCE BURLINGTON NORTHERN HAS AN ADEQUATE REMEDY AT STATE LAW, IN ABSENCE OF CLEAR CONGRESSIONAL EXPRESSION TO THE CONTRARY, IT SHOULD BE REQUIRED TO PURSUE ITS VALUATION DISPUTES IN A STATE ADMINISTRATIVE FORUM.

Burlington Northern has the right to challenge the valuation of its property administratively before both the Tax Commission and the State Equalization Board. See Okla. Stat. Ann. tit. 68 §§ 2454 and 2467 (West Supp. 1987). It can then appeal these decisions to the Oklahoma Supreme Court. *Tulsa Classroom Teachers Association v. State Equalization Board*, 601 P.2d 99, 102 (Okla. 1979); Okla. Stat. Ann. tit. 75, §§ 301-326 (West 1976 & Supp. 1987). Burlington Northern has not contended that this process is in any way procedurally inadequate, which was noted by the Tenth Circuit in its opinion (Pet. App. 5a, n.1). *Cf. California v. Grace Brethren Church*, 457 U.S. 393 (1982).

In *Alabama Public Service Commission v. Southern Railroad*, 341 U.S. 341 (1951), a case in which this Court held that the Johnson Act, 28 U.S.C. § 1342, did not apply, this Court held that federal equitable jurisdiction should still not be exercised. In that case, where the railroad contended that an Alabama law which prohibited discontinuance of certain railroad passenger services, the Court held that since "adequate state court review of an administrative order based upon predominately local factors is available to [the railroad], intervention of a federal court is not



necessary for the protection of federal rights." *Id.* at 349.<sup>21</sup>

In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) this Court held that the federal district court should have dismissed the complaint in a case involving proration orders in Texas oil fields. Professor Wright has noted that this case was decided "on the ground that the issues involved a specialized aspect of a complicated regulatory system of state law." C. Wright, *The Law of Federal Courts*, § 52 (1984 ed.). See also *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (the Court states that FDA is better equipped than the courts to deal with the variables involved in its duties); and *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28-29 (1959) (eminent domain is intimately involved with sovereign prerogative and abstention is proper based partly on "[t]he special nature of eminent domain. . .").

The State contends that, in view of the complex and specialized nature of valuation and subsequent taxation, the state administrative process is the appropriate forum for determining tax liability.

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 105 S.Ct. 3108 (1985), this Court held that the plaintiff could not bring a 42 U.S.C. § 1983 action based upon an alleged violation of the Just Compensation Clause if the state provides an adequate procedure for seeking just compensation. *Id.* at 3121. See also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (equitable relief was not available to enjoin an alleged taking of private property for a public use when a suit for compensa-

<sup>21</sup> Significantly, the Court noted that the "interblending of the interstate and intrastate operations does not deprive the states of their primary authority over intrastate transportation in the absence of congressional action supplementing that authority." *Id.* at 345.

tion can be brought against the sovereign subsequent to the taking).

In *Williamson County*, the Court cited *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Hudson v. Palmer*, 468 U.S. 517 (1984), which held that when a person is deprived of property through a random and unauthorized act by a state employee, whether intentionally or negligently, the Constitution is satisfied by a meaningful state postdeprivation remedy and an action under § 1983 will not lie. *Williamson County*, 105 S.Ct. at 3121-22.

In the present case, since there is an adequate remedy at state law regarding Burlington Northern's valuation disagreement with the State, federal court jurisdiction should not exist in the absence of a clear statute to the contrary.

Furthermore, any alleged violation of federal constitutional law can be reviewed by means of a petition for a writ of certiorari to this Court. See *Hooper v. Bernalillo County Assessor*, 105 S.Ct. 2862 (1985) (New Mexico law giving a \$2,000 tax exemption to Vietnam veterans residing in New Mexico since May 8, 1976 violated equal protection); and *Arizona Public Service Co. v. Snead*, 441 U.S. 141, 146 (1979).

Significantly, federal law also prohibits injunctions being issued against its taxation process. 26 U.S.C. § 7421. Even a suit for a refund cannot be commenced until administrative steps have been completed. 26 U.S.C. § 7422; 26 C.F.R. § 601.105 (1986). This Court has noted that § 7421 was "written against the background of general equitable principles disfavoring the issuance of federal injunctions against taxes, absent clear proof that available remedies at law were adequate." *Bob Jones University v. Simon*, 416 U.S. 725, 742, n. 16 (1974).

### CONCLUSION

The State requests this Court to affirm the judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

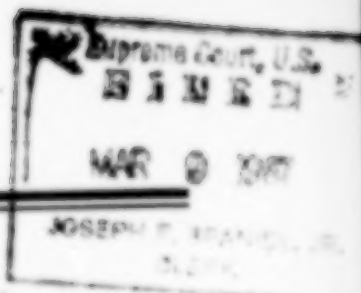
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No. 86-337



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Petitioner,*

v.

OKLAHOMA TAX COMMISSION, *et al.*,  
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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OCTOBER TERM, 1986

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BURLINGTON NORTHERN RAILROAD COMPANY,  
*Petitioner,*  
 v.  
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*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
 for the Tenth Circuit

\_\_\_\_\_  
**REPLY BRIEF FOR PETITIONER**  
 \_\_\_\_\_

As petitioner Burlington Northern has demonstrated, section 306 of the 4-R Act unambiguously prohibits *all* forms of state tax discrimination against interstate rail carriers, including that resulting from overvaluation of railroad property.<sup>1</sup> Indeed, the terms of section 306 so clearly mandate this result that neither respondent has sought support for its position in the plain language of the statute.<sup>2</sup> Instead, respondents claim that Congress

<sup>1</sup> Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 306, 90 Stat. 31, 54 (codified at 49 U.S.C. § 11503) (1982)).

<sup>2</sup> Respondents are the Oklahoma Tax Commission ("Tax Commission"), the State Board of Equalization ("State Board"), and the respective members of those two agencies. The Tax Commission and the State Board, which filed separate responsive briefs on the merits, both eschew the "plain meaning" of § 306. See Tax Commission Brief at 18 ("plain meaning rule . . . is not enough in construction of § 11503"); State Board Brief at 8 ("no clear expression of intention is present").



implicitly excepted one highly effective form of tax discrimination from this otherwise comprehensive prohibition. Respondents contend that a federal court applying section 306 may not inquire into the true market value of a railroad's property to determine whether tax discrimination has occurred, or that it may do so only after a demanding threshold intent requirement has been met—a reading of the statute that would eviscerate the federal remedial scheme Congress adopted.

Significantly, neither respondent disputes that overvaluation of railroad property can yield discriminatory results every bit as serious as those caused by more overt forms of discrimination. As the facts of this case show, overvaluation can be a potent means of making railroad property bear a disproportionate tax burden. See Petitioner's Brief at 9-10 & n.17. Respondents, however, ask this Court to ignore both this practical reality and the express terms of section 306.

In their efforts to truncate section 306, respondents have sought to depict this carefully limited statute as a draconian intrusion upon the taxing authority of the states. Echoing the decisions below, respondents argue that the statute threatens to turn federal courts into "super-assessment boards" for all valuation disputes involving railroads.

That characterization is wholly unwarranted. Burlington Northern has never contended that section 306 gives federal courts jurisdiction over every dispute involving the valuation of railroad property.<sup>3</sup> What section 306 does prohibit is the *discriminatory* state taxation of railroads. If a railroad's property is taxed in proportion to that of other taxpayers within a state, the railroad must

<sup>3</sup> In fact, traditional valuation disputes involving the taxation of railroad property have continued to be litigated in state court. See, e.g., *In re Southern Ry.*, 313 N.C. 177, 328 S.E.2d 235 (N.C. 1985); *Southern Ry. v. State Bd. of Equalization*, 682 S.W.2d 196 (Tenn. 1984).

depend on the state's own remedies to resolve any overvaluation dispute that may arise.<sup>4</sup> Conversely, disproportionate state taxation of railroads is unlawful and subject to federal remedy, no matter how it is accomplished.<sup>5</sup> Thus, where a state's overvaluation of railroad property yields a discriminatory result, the federal courts may provide the carefully circumscribed but essential relief set forth in the statute.

Contrary to respondents' claim, no constitutional rule prohibits Congress from displacing state taxing authority to this extent, nor does any principle of comity or federalism require a particular threshold showing before a federal court may entertain a case of this nature. Respondents' arguments on these points are, at base, no more than policy disagreements with the statutory scheme Congress chose to enact. There is thus only one reasonable interpretation of section 306: that it directs federal courts to remedy state tax discrimination against railroads, whatever the root cause of that discrimination might be.

<sup>4</sup> For instance, if a state were to overvalue all property on a uniformly proportionate basis rather than increasing the nominal tax rate, § 306 would provide no remedy for overvaluation of a railroad's property.

<sup>5</sup> As this Court recently observed, the antidiscrimination policy of § 306 was designed to curb the "temptation [on the part of state and local governments] to excessively tax nonvoting, non-resident businesses in order to subsidize general welfare services for state residents." *Western Air Lines, Inc. v. Board of Equalization*, 55 U.S.L.W. 4202, 4204 (U.S. Feb. 24, 1987). Unlike the tax in *Western Air Lines*, the tax at issue here is not specifically allocated to the benefit of interstate carriers, but is used for general revenue purposes by Oklahoma counties. Moreover, § 306 contains no provision comparable to the "in-lieu" clause of the airline statute relied upon by the Court in that case.

## ARGUMENT

### I. SECTION 306 PLAINLY AUTHORIZES FEDERAL COURTS TO REMEDY STATE TAX DISCRIMINATION RESULTING FROM RAILROAD PROPERTY OVERVALUATION

Respondents brush past the text of section 306, according it little significance in their interpretations of the statute.<sup>6</sup> Indeed, respondents are unable to offer a convincing explanation of the statutory scheme that integrates their proposed overvaluation exception into the language and policy of the statute.<sup>7</sup> Contrary to respond-

<sup>6</sup> See note 2, *supra*. The Tax Commission even argues that the statutory text of § 306 should be ignored in favor of a later recodification. See Tax Commission Brief at 2. As numerous courts have held, however, the 1978 recodification of the Interstate Commerce Act made no substantive changes, and there have been no other revisions of § 306. See Petitioner's Brief at 2 n.2. In any event, while the Tax Commission argues that the language of the recodified § 11503 should be preferred to that of § 306, it makes no attempt to show how *either* version can be read to support its position.

<sup>7</sup> The State Board concedes that a claim of discriminatory overvaluation of railroad property may be brought in federal court, if the state's administrative and judicial remedies are shown to be less than plain, speedy, and efficient. State Board Brief at 20 & n.6. This is tantamount to admitting the error of the decisions below. Congress made an express finding that state remedies in this area are inadequate, and explicitly exempted § 306 from the operation of the Tax Injunction Act, 28 U.S.C. § 1341 (1982). § 306(2); see *infra* at 17-19 & nn.29-30. Since Congress has already made the precise determination upon which the State Board would have federal jurisdiction turn, the State Board's position dissolves into a mere policy disagreement with Congress.

For its own part, the Oklahoma Tax Commission effectively concedes that, as a substantive legal matter, § 306 prohibits state tax discrimination resulting from overvaluation of railroad property, arguing merely that such a case should be brought in state rather than federal court. Tax Commission Brief at 38-39. By its very terms, however, the jurisdictional grant of § 306 is co-extensive with its substantive scope. Compare § 306(1) ("unlawful . . . to commit any of the following prohibited acts") with § 306(2) (federal court jurisdiction "to prevent, restrain, or terminate any acts in violation of this section"). Thus, if a § 306 case

ents' position, however, the plain language of section 306 clearly resolves the question before this Court.

Subsection 306(1)(a) requires that the ratios of "assessed" value to "true market" value must be equivalent (within five percent) for railroad property and for all other commercial and industrial property. § 306(1)(a), (2)(c). The only way for a court to determine whether that requirement has been met is to make factual findings concerning each of the four factors that go into the comparison. Two of the four factors—the assessed values—can in effect be lifted from state or local tax records, since they will rarely be in dispute. While one or both of the true market values may also be uncontested in certain cases, what respondents contend is that the true market value of railroad property can *never* be determined by the federal court, even if it constitutes the crux of the railroad's discrimination claim. Tax Commission Brief at 14; State Board Brief at 17-18. Respondents' interpretation of section 306 thus would reduce the statutory four-factor comparison to a single variable: the true market value of other commercial and industrial property.

It would be perverse indeed to read a law that specifically addresses *railroad* property taxation so as to make the value of *non-railroad* property the sole litigable issue. Having charged the federal courts with the duty to determine whether the ratio of assessed value to true market value is the same for railroad property as for other commercial and industrial property, Congress must have intended those courts to engage in whatever fact-finding is required to make that determination.

The results yielded by respondents' construction of the statute are even more anomalous. For example, in states that assess commercial and industrial property at its full true market value (i.e., at a one-hundred-percent assessment ratio), railroad property could be assessed at *any* value *whatever* without triggering section 306, so long

involving overvaluation issues may be brought in state court, it may also be brought in federal court.



as the state declared the true market value of that property to be the same as the assessment.<sup>8</sup> Such anomalous consequences can be avoided only by giving the statute its plain meaning.

Respondents' narrow interpretation also fails because it makes the outcome of a section 306 case dependent upon state law and administration. If the state's own determination of "true market value" is given binding effect in federal court, then state law will control the meaning of that term. This Court has declared that federal statutes should not be interpreted to allow state law to control their essential terms, absent a clear statement to that effect. *See, e.g., Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119 (1983). More important, "the general principle that, absent clear indication to the contrary, the meaning of words in a federal statute is a question of federal law has especial force when the purpose of the federal statute is to eliminate discriminatory state treatment of interstate commerce." *Western Air Lines*, 55 U.S.L.W. at 4204.

Section 306 contains no "clear indication" that state law or administration should control the determination of the "true market value" of railroad property. Indeed, the entire premise of the statute is that federal relief from state tax discrimination is necessary because of the inadequacy of existing state remedies. *See infra* at 18 & n.30. There is no warrant for assuming that Congress meant to commit a critical factual issue to state administrative processes, and consequently no basis for construing section 306 to make the true market value of railroad property solely a matter of state law.

The comprehensive structure of section 306(1) confirms that Congress intended to eliminate all forms of tax discrimination against railroads. In particular, subsection (1)(d)—the catchall provision that prohibits "any other tax which results in discriminatory treat-

<sup>8</sup> A number of states require assessment ratios of one hundred percent.

ment" of a railroad—evidences Congress' intent that no form of tax discrimination should escape the statute's reach. Given the historic prevalence of discrimination in property taxation, there would have been no reason to prohibit all other types of discriminatory taxes if Congress believed that subsection (1)(a) left open a potential property tax abuse. The catchall provision thus reaffirms that subsection (1)(a) encompasses discriminatory taxation resulting from railroad property overvaluation.<sup>9</sup>

The State Board argues that subsection (1)(d) encompasses only discriminatory taxes other than property taxes, and that discrimination through railroad property overvaluation—which it claims is not covered by subsection (1)(a)—therefore remains beyond federal review.<sup>10</sup> If discrimination resulting from overvaluation of railroad property could somehow be regarded as falling outside subsection (1)(a), however, it would necessarily be covered by subsection (1)(d)'s prohibition of "any other tax which results in discriminatory treatment." The State Board's argument that discrimination resulting from overvaluation falls outside the scope of both subsec-

<sup>9</sup> This conclusion is also confirmed by the burden of proof clause in § 306(2)(d). The State Board argues that this clause contemplates proof of the market value of non-railroad property only. State Board Brief at 18. The clause on its face contains no such restriction, however. Where, as in § 306(2)(e), Congress meant to limit a provision to non-railroad property, it said so in unmistakable terms. The absence of such a restriction in § 306(2)(d) is therefore compelling proof that Congress meant it to apply to both railroad and non-railroad property. Finally, under the "applicable state law[s]" adopted as the burden of proof in § 306 cases, the value of a taxpayer's own property is certainly capable of proof. *See, e.g., Continental Oil Co. v. State Bd. of Equalization*, 494 P.2d 645, 648-49 (Okla. 1972).

<sup>10</sup> State Board Brief at 18-20. The Tax Commission argues a somewhat inconsistent position, contending that § 306(1)(d) applies only to taxes enacted after passage of the statute. Tax Commission Brief at 16. No support is offered for this novel view of the statute.



tions (1)(a) and (1)(d) simply does not square with the language or structure of the statute.

At bottom, it is unreasonable to contend that Congress authorized federal court review of all kinds of state tax discrimination against railroads save one. "The illogical results of applying such an interpretation . . . argue strongly against the conclusion that Congress intended these results." *Western Air Lines*, 55 U.S.L.W. at 4205. When the asserted exception is as obvious as overvaluing the railroad's property, the contention is even more implausible. Without any textual basis, respondents would create a loophole large enough to swallow the statute, and thereby vitiate Congress' goal of ending all forms of state tax discrimination against railroads.

## II. THE LEGISLATIVE HISTORY OF SECTION 306 CONTAINS NO EVIDENCE THAT CONGRESS INTENDED STATE TAX DISCRIMINATION RESULTING FROM OVERVALUATION TO BE RESERVED FOR STATE REVIEW ALONE

On the premise that the language of section 306 does not resolve this case, respondents turn to selected excerpts from the statute's voluminous legislative history. Tax Commission Brief at 18; State Board Brief at 20-23. Given the clarity of the statutory text, this exercise is unnecessary, but in any event, the legislative history manifests no intent to deviate from the plain language of section 306. The Senate Committee observed that section 306 is "adequate to accomplish the intended purpose of eliminating discriminatory taxation." S. Rep. No. 1483, 90th Cong., 2d Sess. 8 (1968). These are plainly not the words of a deliberative body aiming to insulate an obvious mode of potential discrimination from review.

Respondents raise three distinct, and somewhat inconsistent, arguments concerning the legislative history of section 306. First, they assert that the overvaluation of railroad property was never brought to the attention of Congress as an element of state tax discrimination.<sup>11</sup>

<sup>11</sup> Tax Commission Brief at 32; State Board Brief at 23, 32.

Second, respondents argue that the railroads assured Congress that federal review of discrimination accomplished through overvaluation was not contemplated by section 306—in essence, that a "bargain" was struck on that point.<sup>12</sup> Third, respondents contend that in enacting the 4-R Act, Congress explicitly wrote relief from discriminatory overvaluation out of the statute in its final form.<sup>13</sup> None of these arguments has merit.

1. Congress was well aware that overvaluation of railroad property could lead to burdensome and discriminatory state taxes. The Doyle Report, the bedrock study for the 4-R Act, devoted considerable attention to disproportionate valuation as a source of excessive taxation of railroads. See Petitioner's Brief at 22-23 & n.33.<sup>14</sup> Indeed, valuation concerns were even addressed in the testimony of Mr. James Ogden cited by respondents.<sup>15</sup> On numerous occasions, state tax officials and others alerted congressional committees to the potential that valuation issues could arise in cases brought under section 306. See Petitioner's Brief at 23-25 & n.38; *infra* at 11-13. This multiplicity of references could hardly have escaped the attention of Congress as it considered the proposed legislation in detail for over fifteen years.

To be sure, before the 4-R Act, overvaluation was not the *primary* problem in the state taxation of railroads. So long as the states were permitted to apply facially higher tax rates and assessment ratios to railroad property than to other property, there was less reason to

<sup>12</sup> Tax Commission Brief at 29-30; State Board Brief at 30-32.

<sup>13</sup> Tax Commission Brief at 20-23, 32.

<sup>14</sup> Respondents concede that the Doyle Report "is the genesis of" § 306 and "the primer on ad valorem taxation." Tax Commission Brief at 25, 27.

<sup>15</sup> *Tax Assessments on Common Carrier Property: Hearings on H.R. 736, H.R. 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess. 18-19 (1964) (valuation is neither incomprehensible nor overly complicated, and can be performed fairly as easily as it can be unfairly).*

resort to the subtler tactic of inflating railroad property values.<sup>16</sup> Yet notwithstanding the predominance of cruder forms of discrimination before 1976, overvaluation of railroad property was certainly put before Congress as a potential source of state tax discrimination.

2. Contrary to respondents' claims, the railroads never assured Congress that section 306 would bar federal courts from inquiring into the true value of railroad property. In support of their "bargain" theory, respondents rely on a few scattered comments made by railroad representatives during the early legislative hearings. Those comments—all of which occurred before 1971—are merely isolated portions of an extensive deliberative record.

Viewed in proper context, the statements respondents cite reveal at most that section 306 was not intended to require a uniform *methodology* for railroad property valuation. *See infra* at 11 n.17. That is an unremarkable proposition; no one would dispute that the states remain free under section 306 to adopt whatever valuation methodologies they choose, so long as they do not discriminate against railroads. A considerable leap is required, however, to reach the conclusion that Congress intended to bar a federal court from correcting a particular valuation *result* yielding impermissible tax discrimination.

Respondents rely primarily on an assortment of oral remarks by Mr. Philip Lanier, one of a number of railroad witnesses, made during the 1969 and 1970 hearings. Respondents claim those remarks constituted a "promise" by the railroads that valuation issues would not be encompassed by the proposed legislation. Whatever Mr. Lanier's remarks may have conveyed, however—and they

<sup>16</sup> Respondents would have this case turn on "historical fortuity," a result this Court shunned in *Western Air Lines*, 55 U.S.L.W. at 4205.

are far from clear<sup>17</sup>—the same witness stated unequivocally in later written testimony that "the bill forbids states and localities to discriminate against interstate

<sup>17</sup> Mr. Lanier, counsel to the Louisville & Nashville Railroad, testified on behalf of the Association of American Railroads. Respondents quote part of a 1969 exchange with Senator Hansen, in which Mr. Lanier said: "The formula varies from State to State and we are not dealing with the valuation question. That is not our problem. We are speaking only of the equalization of the tax rate." *State Tax Discrimination Against Interstate Carrier Property: Hearings on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 39 (1969). Mr. Lanier's response was addressed to Senator Hansen's question concerning the valuation formula used in Wyoming. *Id.* Notably, Mr. Lanier supplemented his oral testimony with a letter, included in the report of the hearings, *opposing* a proposed amendment that would have committed determination of the true market value of railroad property to state agencies, the very result respondents seek here. Letter from Mr. Lanier to Senator Hartke (October 23, 1969), *reprinted in id.* at 107-08. *See* Petitioner's Brief at 24.

Mr. Lanier testified again a year later, and respondents quote him as follows:

On the valuation—this bill would not deal with valuation being standard. The standards and methods of valuation that any State wishes to use would be totally unaffected by this legislation . . . . [I]t is only in the area of equalization of the computed value that this legislation speaks. That is where our problem is.

*Common and Contract Carrier State Property Tax Discrimination: Hearings on H.R. 16245, H.R. 16251, H.R. 16316, H.R. 16357, H.R. 16411, H.R. 16639, and S. 2289 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 138 (1970). Respondents also quote Mr. Lanier's statement: "Because we are speaking in terms of uniformity of the equalization ratio, . . . once the fair market value is determined . . . ." *Id.* at 139. These comments came in the midst of an extended colloquy between the witness and Representative Adams, in which the latter had inquired whether the bill would mandate that a railroad right-of-way be valued at no greater than the value of an adjacent "vacant property plus the value of the rails." *Id.* at 139. Mr. Lanier was simply explaining that the proposed legislation would neither require that particular result, nor require the use of any particular valuation method.



carriers in *fixing the levels of value* at which the transportation property . . . is fixed for purposes of taxation.”<sup>18</sup> Thus, as of 1971, Mr. Lanier was plainly on record before Congress with the view that the proposed legislation *did* encompass discriminatory overvaluation of rail property.

Indeed, the legislative history contains numerous references to the valuation issue after 1970—the date by which respondents contend their alleged legislative “bargain” was struck. The record reflects an understanding that the bills would permit federal judicial fact-finding with respect to overvaluation of rail property. For example, Mr. Charles Conlon of the National Association of Tax Administrators repeatedly advised congressional committees that, in a case brought under section 306, “any point bearing on the validity of that tax, not only the percentage of assessment . . . is going to come before the court.”<sup>19</sup> Mr. Conlon also explained that the “matter of assessment levels cannot be considered apart from the basic *valuations* put on properties of all kinds including *railroad property*.” *House Hearings of 1972* at 1239 (prepared statement) (emphasis added). Indeed, elaborating upon the broad scope of the proposed legislation, Mr. Conlon offered an example:

The property of the complaining carrier might be equalized at what *appeared* to be the same assessment ratio that is applied to other property but *in the valuation process the property was overvalued so that when the assessment ratio was applied*

<sup>18</sup> *Surface Transportation Legislation: Hearings on S. 2362, S. 1092, S. 1914, S. 2635, S. 2841, S. 2842 and S. Con. Res. 56 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, 92d Cong., 1st Sess. 297 (1971-72) (“Senate Hearings of 1971-72”) (prepared statement) (emphasis added).*

<sup>19</sup> *Transportation Act of 1972: Hearings on H.R. 11824 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 2d Sess., pt. 4, 1244-45 (1972) (“House Hearings of 1972”); see id. at 1237; Senate Hearings of 1971-72 at 208.*

*against the overvaluation the result would be an overvalued segment of property.*

Now in order to deal with that kind of case *the court definitely would have to be involved in the original assessment of the property.*

*Senate Hearings of 1971-72* at 209 (emphasis added). That hypothetical is now before this Court.<sup>20</sup>

Legislators well understood the potential for overvaluation to contribute to state tax discrimination. Senator Pearson expressed “surprise[ ] . . . that my State was up near the top among those which had discriminated in the *different valuations*, tax rates, et cetera.” *Senate Hearings of 1971-72* at 294 (emphasis added). Representative Adams, a sponsor of the bill, stated that “[w]e establish a uniform situation for the transportation system as opposed to a checkerboard situation of taxes for varying state procedures and various court procedures for *valuation* of an interstate facility.” *House Hearings of 1972* at 1245 (emphasis added).<sup>21</sup>

In short, the legislative history refutes the theory of a “deal” eliminating overvaluation from the statute’s coverage. Coupled with the fact that all of the quotations relied upon by respondents are taken from the early stages of the legislative process—well before the addition of the broad catchall prohibition of “any other

<sup>20</sup> Certain amici argue that, after 1970, no federal agency suggested § 306 would provide relief for railroad property overvaluation. See Brief Amici Curiae of Fifty California Counties at 22. But in 1972, when the Interstate Commerce Commission was asked to comment on the compatibility of a Tennessee constitutional initiative with the draft legislation, it declined to offer a definitive response, citing the failure of the initiative to ensure uniform ascertainment of values for rail and other property. *Senate Hearings of 1971-72* at 338. Thus, the ICC continued to view unequal valuation as a potential source of tax discrimination against railroads.

<sup>21</sup> Mr. Adams also observed that assessment of value and application of a tax rate are effectively interchangeable as methods of potential discrimination. *House Hearings of 1972* at 1305.



tax which results in discriminatory treatment"—it is apparent that there is no basis in the legislative history for narrowing the plain meaning of the statute.

3. Respondents are also unpersuasive in contending that, by adopting the Senate rather than the House version of the bill that became section 306 of the 4-R Act, the Conference Committee implicitly rejected the House's view of subsection (1)(a) as prohibiting "overvaluation." The texts of the two bills, including those portions that would become subsection (1)(a), were substantially identical.<sup>22</sup> The descriptions of the bills in the Conference Report differed, but only to the extent that the description of the House version expressly mentioned overvaluation as a prohibited practice, while the description of the Senate version—which simply traces the statutory language—did not mention any prohibited practices specifically. S. Conf. Rep. No. 595, 94th Cong., 2d Sess. 165-66 (1976). The Conference Report nowhere suggests that the plain language of either bill was to be implicitly restricted in any way. *Id.*

### III. NEITHER THE CONSTITUTION NOR ANY PRINCIPLE OF FEDERALISM SUGGESTS THAT SECTION 306 SHOULD BE READ IN AN UNNATURALLY RESTRICTIVE MANNER

This is a straightforward case of statutory interpretation. The question before this Court is not what Congress should have done, but what it did. Yet in an attempt to restrict the statute's scope, respondents raise a bevy of policy arguments concerning the proper balance of federal and state interests. State Board Brief at 14; Tax Commission Brief at 33-36. These arguments do little more than recycle the political issues Congress disposed of when it enacted section 306. As this Court has recognized on many occasions, if a statute speaks clearly as a valid exercise of federal authority, no further in-

<sup>22</sup> The respective versions of subsection (1)(a) are reproduced in the Appendix to this Brief.

quiry into its impact on state and local prerogatives is necessary.<sup>23</sup>

Among the most clearly established federal powers is that to regulate interstate commerce and, in particular, to prevent state discrimination against interstate commerce. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). The force of the Commerce Clause is greatest where, as here, Congress has acted directly to eliminate state tax discrimination. So long as there is a rational basis upon which Congress could find state interference with interstate commerce, and so long as reasonable means are employed to eliminate that interference, the statute is unquestionably valid. *Arizona Public Service Co. v. Snead*, 441 U.S. 141, 150 (1979); see *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7 (1983). Under any interpretation of its scope, section 306 satisfies this standard.<sup>24</sup>

When respondents raise the spectre of federal courts meddling in the states' fiscal affairs, they ignore the federal interests impelling the limited intrusion worked by section 306. Any "interference" with state taxing authority is necessarily attendant to accomplishing the important federal objective of sheltering interstate commerce from excessive financial burdens. Section 306 was

<sup>23</sup> See, e.g., *United States v. Turkette*, 452 U.S. 576, 586-87 (1981) (RICO statute plainly created "new domain of federal involvement" due in part to inadequacy of existing state law); *Scarborough v. United States*, 431 U.S. 563, 577 (1977) (no inquiry into federal-state balance where statute is unambiguous).

<sup>24</sup> Reference to the constitutional authority underpinning § 306 would be unnecessary but for the eleventh-hour contention that, if read to encompass claims of railroad property overvaluation resulting in discrimination, the statute would be unconstitutional. Brief for the States of Kansas, *et al.*, as Amici Curiae, at 13-18; see State Board Brief at 47. No constitutional challenge to § 306 was raised below, however, and no constitutional issue is before this Court.

narrowly tailored to ensure it had no *unwarranted* impact on state judicial or fiscal administration.<sup>25</sup>

In any event, respondents' "interference" complaint proves too much. There is no greater intrusion on a state's taxing power when a federal court partially invalidates a state tax because of discriminatory overvaluation of railroad property than when it does so based on discriminatory undervaluation of non-railroad commercial and industrial property. But respondents concede, as they must, that the latter relief is authorized by section 306.<sup>26</sup> Thus, there can be no doubt that, even when the statute is accorded its plain meaning, the impact of section 306 on state tax systems is well within the powers granted to Congress under the Commerce Clause.<sup>27</sup>

<sup>25</sup> For a review of the numerous restraints on the exercise of federal jurisdiction built into § 306, see Petitioner's Brief at 6-7 and the Brief of the United States as Amicus Curiae at 3-4, 20-21, 23-25.

<sup>26</sup> Respondents misread both the statute and this Court's decision in *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744 (1961), in arguing that *Moses Lake Homes* precludes construing § 306 to set up a federal court as a tax "assessor." State Board Brief at 47; Tax Commission Brief at 38. In contrast to § 306, *Moses Lake Homes* involved an all-or-nothing situation: if the state tax was invalid because of discrimination against the federal interest, it was completely invalid. On that basis, this Court found it improper for the federal court to reinstitute the "valid portion" of the state tax. *Id.* at 751-52. *Moses Lake Homes* thus is inapposite to this case; moreover, if that decision *did* apply, it would dictate that any state tax that discriminates against railroad property by means of overvaluation would be *invalid in its entirety*.

<sup>27</sup> Remarkably, the State Board contends that, even if § 306 encompasses state tax discrimination through overvaluation of railroad property, a supposed "federal common law" of "discriminatory overvaluation of property" requires a showing that the discrimination is "fraudulent or intentional" before a remedy may be supplied. See State Board Brief at 34-36 & n.12. In support of this proposition, the State Board cites a series of vintage cases decided by this Court. *Id.*

The argument drastically misses the mark; under its modern Commerce Clause analysis, this Court has adopted *objective* standards of review, focusing on the economic incidence of a challenged

Respondents' remaining arguments amount to nothing more than a diffuse objection that Congress could not truly have intended to restrict the states in the manner it did. This complaint blinks the reality not only of section 306, but of the 4-R Act as a whole. In the midst of an unprecedented national rail crisis, Congress perceived the need for a major overhaul of governing policy toward the railroad industry. This entailed not only stripping away layers of federal regulation, but also restricting the states in areas where they had previously been permitted greater leeway—as in the regulation of intrastate rail rates. Pub. L. No. 94-210, § 210, 90 Stat. 31, 46 (1976).<sup>28</sup> Viewed in this context, it is not surprising that Congress was willing in 1976 to adopt measures to end the discriminatory state taxation of rail carriers that it had previously considered unnecessary.<sup>29</sup>

tax, rather than the state's intent. See, e.g., *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 331 (1977); *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 69 (1962) (citations omitted); *Railway Express Agency, Inc. v. Virginia*, 347 U.S. 360, 363 (1954) (citations omitted). Accordingly, no demonstration of discriminatory intent is necessary to establish a violation of the Commerce Clause, see, e.g., *Norfolk & Western Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317, 329 (1968) (state property tax held invalid without inquiry into discriminatory intent), nor is there any "federal common law" dictating a contrary result.

Respondents' argument would be misguided even if it were premised on an accurate view of the law prior to passage of the 4-R Act. As a statute, § 306 displaces prior law under the dormant Commerce Clause, supplying specific statutory standards—none of which even mentions intent—for adjudication of cases alleging discriminatory state taxation of railroads. To the extent any doubt could be said to exist in this respect, the statute is entitled to a presumption that it goes *further* than preexisting law in the prevention of tax discrimination. See *Arizona Public Serv. Co. v. Snead*, 441 U.S. at 151-52 (Rehnquist, J., concurring).

<sup>28</sup> Four years later, even more stringent restrictions upon state authority over interstate railroads were imposed by the Staggers Rail Act of 1980, Pub. L. 96-448, § 214(a)-(c) (1), 94 Stat. 1895, 1913-15.

<sup>29</sup> Surprisingly, respondents continue to argue that, as to matters of railroad property valuation, the scope of § 306 is circumscribed



Respondents would commit tax discrimination disputes arising out of overvaluation of railroad property to state review alone. In concluding that federal court jurisdiction was needed, however, Congress explicitly determined that state administrative and judicial remedies in this field were inadequate.<sup>30</sup> Congress sought to establish a

by the Tax Injunction Act, 28 U.S.C. § 1341 (1982). Tax Commission Brief at 33-35; State Board Brief at 15. Subsection (2) of § 306 contains a plain statement to the contrary, making federal relief available "[n]otwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State." A clearer exception to the Tax Injunction Act would be difficult to imagine.

<sup>30</sup> See H.R. Rep. No. 725, 94th Cong., 1st Sess. 76-77 (1975); S. Rep. No. 1085, 92d Cong., 2d Sess. 4-5 (1972) (In practice, 28 U.S.C. § 1341 closes federal courts to carriers burdened by discriminatory taxation, "without . . . ensuring them a plain, speedy, and efficient State remedy."); S. Rep. No. 630, 91st Cong., 1st Sess. 6-7 (1969) (State administrative procedures to challenge taxes are "often difficult, time consuming, and not productive of material relief"; relief in the state courts is slow; and "State courts are very reluctant to overturn the action of the assessing body, and they exert every effort to sustain the tax administrators."); S. Rep. No. 1483, 90th Cong., 2d Sess. 6 (1968) (same).

The legislative record thus directly refutes respondents' assertions as to the adequacy of state remedies. See Tax Commission Brief at 25; State Board Brief at 10, 20 & n.6. Indeed, even after passage of § 306, state remedies in valuation disputes continue to present long delays and permit no independent judicial inquiry into the facts underlying state administrative determinations. See, e.g., *Trailer Train v. State Bd. of Equalization*, 180 Cal. App. 3d 565, 225 Cal. Rptr. 717, 726 (Cal. Ct. App. 1986) (review limited to administrative record); *Southern Ry. v. Board of Equalization*, 682 S.W.2d 196, 199 (Tenn. 1984) (board's appraisal stands unless unsupported by substantial evidence on the record); *In re Assessment of Omaha, Lincoln & Beatrice Ry.*, 213 Neb. 71, 327 N.W.2d 108, 111 (Neb. 1982) (presumption in favor of administrative valuation); *Richmond, F. & P. R.R. v. State Corp. Comm'n*, 219 Va. 301, 247 S.E.2d 408, 415 (Va. 1978) (deference to board in valuation matters). See also Okla. Stat. Ann. tit. 68, § 2467 (West Supp. 1987) (amount of tax "protested and paid under protest shall be limited to the full amount of tax for the prior year"); Okla. Stat. Ann. tit. 68, § 2468 (West 1966) (upon judicial review, presumption in favor of State Board).

federal forum for fair and expeditious resolution of *all* issues relating to alleged tax discrimination by a state or its localities against railroads.<sup>31</sup> Section 306 represents a clear determination, based on the historical inability of railroads to obtain effective relief at the state level, that an unusual degree of federal involvement is required to protect interstate commerce. Given that legislative decision, arguments based upon federalism or judicial doctrines of comity are irrelevant to interpretation of the statute before this Court.

In sum, Congress has made a judgment that state tax discrimination against railroads is a national problem, calling for a national solution. On its face, the statute Congress enacted authorizes federal courts to remedy *all* state taxes that impose a disproportionate burden on railroads, and there is nothing to indicate that the statute does not mean precisely what it says. If section 306 is to have its intended effect, it must be read as authorizing federal courts to remedy all state tax discrimination against railroads, regardless of how that discrimination is accomplished.

<sup>31</sup> See H.R. Rep. No. 725, 94th Cong., 1st Sess. 77 (1975) ("Relief from discrimination in the Federal courts is essential because railroads are located in numerous taxing jurisdictions and under state law may be required to bring numerous suits in various jurisdiction[s] to obtain relief."); S. Rep. No. 445, 87th Cong., 1st Sess. 466 (1961) (object is to "provide a forum other than at the State level to decide such unlawful assessment and collection of taxes"); see also *Tax Assessments on Common Carrier Property: Hearings on H.R. 4972 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 5-6 (1966) (letter from Advisory Commission on Intergovernmental Relations' spokesman William Colman, March 4, 1966) (Bill gives "Federal courts jurisdiction over litigation pertaining to such assessments" and "channel[s] technical tax issues to Federal courts of general jurisdiction"; there has been an unacceptable "spread of inconsistent valuation practices between States, among taxing districts within States, and among properties within taxing districts.").



## CONCLUSION

For the reasons stated in the Brief for Petitioner and in this Reply, this Court should reverse the order and judgment of the Court of Appeals, and the case should be remanded to the District Court.

Respectfully submitted,

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March 9, 1987

## APPENDIX

The text of section 306(1)(a), both as originally passed by the Senate and as finally enacted into law, read as follows:

The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

S. 2718, 94th Cong., 1st Sess. § 207 (passed by the Senate December 2, 1975).

The corresponding text in the House bill, as passed and forwarded to the Conference Committee, was as follows:

The assessment (but only to the extent of any portion based on excessive values as hereinafter described in paragraph (3)), for purposes of a property tax levied by any taxing district, of transportation property owned or used by a carrier by railroad subject to this part at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other commercial and industrial property (located in the assessment jurisdiction of any State in which is included such taxing district and subject to a property tax levy) bears to the true market value of all such other commercial and industrial property.

H.R. 10979, 94th Cong., 1st Sess. § 601 (1975) (passed by the House December 17, 1975).

**MOTION FILED**  
**DEC 12 1986**

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No. 86-337

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Petitioner,*

v.

OKLAHOMA TAX COMMISSION, *et al.*,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

**MOTION OF THE ASSOCIATION OF AMERICAN  
RAILROADS FOR LEAVE TO FILE A BRIEF AS  
AMICUS CURIAE AND BRIEF AS AMICUS CURIAE  
IN SUPPORT OF THE PETITIONER**

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December 12, 1986

IN THE  
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---

**MOTION OF THE ASSOCIATION OF AMERICAN  
RAILROADS FOR LEAVE TO FILE BRIEF  
AS *AMICUS CURIAE***

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The Association of American Railroads ("AAR") respectfully moves, pursuant to Supreme Court Rule 36.3, for leave to file the accompanying brief as *amicus curiae* in support of the petitioner.<sup>1</sup>

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<sup>1</sup> Petitioner has consented to the filing of the brief. The letter signifying this consent has been filed with the Clerk. Respondents have withheld consent.



The AAR is the trade association for the nation's railroads. Its members employ approximately ninety-four percent of the workers, operate approximately ninety-two percent of the trackage, and account for approximately ninety-seven percent of the freight revenues of all railroads in the United States. The AAR represents its members before courts, agencies and the U.S. Congress when matters of common concern are at issue.

The decision of the Court of Appeals in this case, unless reversed, will have a serious and adverse effect on the railroad industry as a whole. In its ruling, the Court of Appeals, relying upon a prior panel decision which the court declined to disturb pursuant to a motion for *en banc* consideration, affirmed a District Court dismissal of a tax discrimination suit brought by the Burlington Northern Railroad Company ("BN") against State of Oklahoma tax authorities under the provisions of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), codified at 49 U.S.C. § 11503 (1982). Pursuant to the jurisdictional test fashioned by the Court of Appeals in its prior decision and applied in the instant case, tax discrimination suits under Section 306 based on claims of discriminatory overvaluation of railroad property by state tax authorities, as set forth by BN in its District Court complaint, may not be brought unless, at the pretrial stage, a petitioner makes "a strong showing of a purposeful overvaluation . . . with discriminatory intent (Pet. App. 2a)." Because BN purportedly did not make a sufficiently strong pretrial showing of intentional discrimination in this case, the Court of Appeals found the District Court dismissal of BN's tax discrimination suit proper.

Should the decision of the Court of Appeals not be overruled by this Court, and the requirement that a rail carrier demonstrate "purposeful overvaluation with discriminatory intent" continue to apply in the Tenth Circuit as a jurisdictional bar to relief for discriminatory

overvaluation claims under 49 U.S.C. § 11503, a serious and wholly unwarranted impediment to a grant of relief under that remedial federal legislation would be allowed to remain in place. Not only would this result directly and adversely affect the numerous AAR member railroads operating in the Tenth Circuit with regard to discriminatory overvaluation claims,<sup>2</sup> it would also adversely affect AAR member railroads operating in other jurisdictions by increasing the cost of interstate transportation by connecting rail carriers and correspondingly decreasing the ability of such connecting carriers to compete effectively with other modes in the provision of interstate transportation services. Imposition of discriminatory state taxes, by decreasing the revenues available to member carriers for the maintenance, rehabilitation and expansion of interstate transportation facilities, also directly and adversely affects the ability of such carriers to provide adequate transportation service to the public.

The AAR, on behalf of its member roads, has participated extensively in the legislative process resulting in the enactment of Section 306 of the 4-R Act and has also participated as an *amicus curiae* in several court cases pertaining to the proper construction of Section 306. Based upon the inclusive scope of its industry membership and its familiarity with the relevant issues in the instant case, the AAR is particularly well-suited to present to the Court for its consideration the impact of the

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<sup>2</sup> At least eight Class I railroads are engaged in interstate operations within the territory embraced by the Tenth Circuit. In addition to petitioner BN, the Atchison, Topeka & Santa Fe Railroad Company, the Chicago and North Western Transportation Company, the Denver & Rio Grande Western Railroad Company, the Kansas City Southern Railway Company, the Missouri-Kansas-Texas Railroad Company, the Southern Pacific Transportation Company, and the Union Pacific Railroad Company operate in the Tenth Circuit.

case below on the railroad industry and the reasons why the railroad industry strongly supports reversal of the judgment below.

Respectfully submitted,

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December 12, 1986

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IN THE  
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OCTOBER TERM, 1986

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*Respondents.*

\_\_\_\_\_  
On Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit  
\_\_\_\_\_

BRIEF OF THE ASSOCIATION OF AMERICAN  
RAILROADS AS *AMICUS CURIAE*  
IN SUPPORT OF THE PETITIONER  
\_\_\_\_\_

INTEREST OF THE *AMICUS CURIAE*

As the trade association for the nation's railroads, the Association of American Railroads ("AAR")<sup>1</sup> has a vital

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<sup>1</sup> The AAR is a voluntary, unincorporated, nonprofit association of railroads operating in the United States, Canada and Mexico. Its member railroads employ approximately ninety-four percent of the workers, operate approximately ninety-two percent of the trackage, and account for approximately ninety-seven percent of the freight revenues of all railroads in the United States. The



interest in the interpretation and application of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, codified at 49 U.S.C. § 11503 ("Section 306").<sup>2</sup> Section 306 was enacted by Congress to prohibit and provide a federal remedy against discriminatory state taxes levied upon railroads, which widespread and long-standing practice Congress found to seriously weaken the nation's railroads and to "constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce." Section 306(1). The AAR, on behalf of the railroad industry, participated in the legislative process that culminated in the passage of Section 306 and has an important and ongoing stake in ensuring that the reforms enacted by Congress in that remedial legislation are not lost to the industry or attenuated through improper judicial construction of Section 306's provisions.

### SUMMARY OF ARGUMENT

The construction of Section 306 set forth in the Court of Appeals' decision has operated in the instant case, and will continue to operate within the Tenth Circuit unless overturned by this Court, as a serious impediment to the effectiveness and uniformity of the federal remedy

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Association represents its member railroads before courts, the U.S. Congress, government agencies and administrative tribunals when matters of common concern are at issue.

<sup>2</sup> There are some differences in language between Section 306 as originally enacted [§ 306 of Pub. L. No. 94-210, 90 Stat. 31, 54 (1976)] and as subsequently recodified at 49 U.S.C. § 11503. However, the recodification was not intended to effect any substantive change, and the original language is authoritative. *Richmond, Fredericksburg v. Department of Taxation*, 762 F.2d 375, 377 (4th Cir. 1985); *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 206 n.1 (8th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981). Accordingly, this section will be referred to hereafter as "Section 306," and all citations will be to Section 306 as originally enacted. Pet. App. at 20a.

against discriminatory state taxation provided by Congress in Section 306. In the instant case, the Burlington Northern Railroad Company ("BN") filed a complaint against Oklahoma state tax authorities pursuant to the provisions of Section 306 claiming that its property had been treated discriminatorily for ad valorem tax purposes in relation to other commercial and industrial property in Oklahoma because state tax authorities had overvalued its property in Oklahoma relative to other commercial and industrial property in the state. The District Court dismissed BN's case prior to trial for lack of subject matter jurisdiction based upon a prior decision of the Court of Appeals [in *Burlington Northern Railroad v. Lennen*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984) ("*Lennen*")] holding that, although discriminatory impact is generally sufficient to establish a claim under Section 306, discriminatory *overvaluation* claims are cognizable under Section 306 only where a railroad can make "a strong showing of purposeful overvaluation . . . with discriminatory intent [715 F.2d at 498]." Pet. App. at 10a.

In its decision in the instant case, the Court of Appeals declined to disturb the *Lennen* holding on motion for *en banc* consideration and found that "the district court correctly applied *Lennen* by requiring Burlington Northern to make a strong showing of intentional discrimination through overvaluation to establish jurisdiction." Pet. App. at 2a. The Court of Appeals also "agree[d] with the district court that Burlington Northern failed to establish a strong initial showing of prima facie case of intentional discrimination" (Pet. App. at 3a)," and affirmed the District Court's dismissal of BN's state tax discrimination claim under Section 306.

The "discriminatory intent" jurisdictional requirement applied by the court below is contrary to the language and purpose of Section 306 and provides a ready means by which state tax authorities within the Tenth Circuit

may (through the simple expedient of systematic overvaluation of railroad property for tax purposes) wholly negate or seriously curtail the availability of federal remedies against state tax discrimination provided by Section 306. Moreover, the "discriminatory intent" test applied by the court below is in direct conflict with recent decisions of the Eighth and Ninth Circuits specifically rejecting a "discriminatory intent" requirement for Section 306 overvaluation claims and is also inconsistent with decisions in other Circuits construing the purpose and scope of Section 306 as to preclude in equal fashion all forms of state tax discrimination. In short, if the "discriminatory intent" test applied by the court below is allowed to stand, it will seriously interfere with the operation of Section 306 as Congress intended and will leave railroads operating within the Tenth Circuit without an effective remedy against state tax discrimination. The AAR therefore strongly supports the petition seeking reversal of the judgment below.

### ARGUMENT

#### I. The "Discriminatory Intent" Jurisdictional Requirement Applied By The Court Below Is Contrary To The Language And Purpose Of Section 306 And Provides A Ready Means By Which State Tax Authorities May Negate The Federal Remedies Against State Tax Discrimination Provided By Section 306

##### A. Section 306 Of The 4-R Act

It has long been recognized that state property taxation of railroads has operated, over the course of many years, "in a fashion inherently discriminatory against the railroads." *Clinchfield R. Co. v. Lynch*, 700 F.2d 126, 128 (4th Cir. 1983); S. Rep. No. 91-630, 91st Cong., 1st Sess. 1-8 (1969); H. Rep. No. 94-725, 94th Cong., 1st Sess. 76-78 (1975). It has also long been recognized that the effects of discriminatory state taxation upon the rail-

road industry has been massive and persistent,<sup>3</sup> and that such tax discrimination operated to seriously weaken the national transportation system (as well as unfairly burden shippers and consumers with excessive transportation costs). See, e.g., S. Rep. No. 91-630, at 3-8; H. Rep. No. 94-725, at 78.

In 1976, Congress set out "to eliminate the long-standing burden on interstate commerce resulting from discriminatory state and local taxation" of railroads by enactment of Section 306 of the Railroad Revitalization and Regulatory Reform Act ("4-R Act").<sup>4</sup> Section 306 (1) (a) provides that a state engages in unlawful tax discrimination if it assesses:

transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

<sup>3</sup> In a 1969 Senate Report it was found that over the previous nine year period the railroad industry had been assessed more than \$900 million in discriminatory state and local property taxes. S. Rep. No. 91-630, at 3; see also H. Rep. No. 94-725 at 78 ("The Committee found that railroads are over-taxed by at least \$50 million each year."). Congress also noted that the railroads "are easy prey" for state and local tax assessors because they are "non-voting, often nonresident, targets for local taxation, and cannot easily remove their right-of-way and terminals." S. Rep. No. 91-630, at 3.

<sup>4</sup> The quoted language comes from the statement of purpose of a predecessor bill to Section 306 as set forth in S. Rep. No. 630, 91st Cong., 1st Sess. 1 (1969); see also S. Rep. No. 92-1085, 92d Cong., 2d Sess. 3 (1972). As consistently recognized by the courts, the relevant legislative history of Section 306 is principally set forth in the extensive consideration Congress gave to prior bills containing language similar in essential respects to Section 306. See *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 865 n.6 (9th Cir. 1983), *cert. denied*, 464 U.S. 846 (1983); *Ogilvie v. State Bd. of Equalization*, 657 F.2d at 206, n.1 (8th Cir. 1981).



Section 306 also makes unlawful the imposition of a state ad valorem tax on railroad property at a tax rate higher than that generally applicable to other commercial and industrial property in the same assessment jurisdiction (306(1)(c)) and broadly prohibits the "imposition of any other tax which results in discriminatory treatment of a common carrier by railroad . . ." (306(1)(d)). Section 306 further provides that federal district courts may grant injunctive relief to prevent violations of Section 306, notwithstanding the provisions of the Tax Anti-Injunction Act, 28 U.S.C. § 1341.<sup>5</sup>

**B. The Lennen Decision Relied Upon By The Court Below**

In affirming the District Court's dismissal of BN's tax discrimination suit because of BN's alleged failure to "establish a strong initial showing of prima facie case of intentional discrimination (Pet. App. at 3a)," the court below relied solely upon its prior decision in *Lennen*, which it found controlling. Pet. App. at 2a. Because the opinion below provides no additional statutory analysis in support of the court's "intentional discrimination" test for overvaluation claims arising under Section 306 (Pet. App. at 2a-3a), resort to the decision in *Lennen* is necessary for analysis of the statutory construction issue raised by the instant case.

In construing the scope of Section 306, the *Lennen* court specifically recognized that Congress intended to equalize both tax rates and assessment ratios between railroad and other commercial and industrial properties in the same assessment jurisdiction. 715 F.2d at 496-97. The court, moreover, specifically recognized that "Section 306 was enacted to prevent both de jure and de facto

<sup>5</sup> 28 U.S.C. § 1341 generally deprives federal district courts of jurisdiction to enjoin state taxation unless there is a showing that a "plain, speedy, and efficient remedy" is not available in the state courts.

discrimination against railroads in the collection of ad valorem taxes" (*Id.* at 497), and specifically identified at least one form of de facto discrimination against railroad property that would fall within the broad provisions of Section 306:

The most common form of de facto discrimination is imposing the same percentage rate of tax on both classes of property, but applying that rate to a value less than the true market value of other commercial and industrial property while applying it to the full true market value of rail property.

*Id.* at 497. Thus the *Lennen* court clearly recognized that de facto *undervaluation* of commercial and industrial property is prohibited by Section 306 and that such conduct on its face would provide a basis for federal injunctive relief under Section 306. *Id.*

The *Lennen* court, however, while acknowledging that discriminatory *overvaluation* of railroad property constitutes "another potential form of discrimination, also de facto" (*id.* at 497), declined to allow a Section 306 discriminatory overvaluation claim to be maintained in the case before it based solely upon proof of actual discriminatory impact. The court reasoned that "it is by no means clear that § 306 was intended to provide relief from every form of de facto discrimination" (*id.*) and further found that the legislative history of Section 306 does not indicate that Congress addressed "the problem or benefits of involving the district courts in the intricacies of the process of arriving at the valuation of rail property." *Id.* at 497. The court also found "no express indication . . . that Congress intended the railroads to escape the general noninterference rule of [28 U.S.C.] § 1341 to the extent that they could challenge the manner in which state assessment officials arrived at the fair market value of their property in federal court on a yearly basis." *Id.* at 498. The Court therefore concluded that "[a]bsent a specific directive from Congress, we are



unwilling to infer that it intended district courts to sit as state tax assessment boards for railroad property." *Id.* The *Lennen* court, however, in implicit recognition that Section 306 must be construed to provide at least some ostensible form of relief for discriminatory state taxation claims based upon overvaluation, adopted the "discriminatory intent" requirement that is the subject of the instant appeal. *Id.* at 498.<sup>6</sup>

**C. The "Discriminatory Intent" Test Applied By The Court Below Is Contrary To The Language And Purpose Of Section 306**

Nowhere in the language or legislative history of Section 306 is there any indication that Congress intended to qualify or limit the broad antidiscrimination relief granted by that remedial legislation through the imposition of a "discriminatory intent" jurisdictional requirement. The prohibitory language of Section 306 is sweeping in its scope, proscribes discriminatory consequences of state taxation without reference to the intent of state tax officials and is specifically directed (*inter alia*) at "assessment ratio" discrimination between railroad property and other commercial and industrial property (306 (1)(a)). Such assessment ratio discrimination, as the *Lennen* Court implicitly recognized, can occur with equal effectiveness either through state *undervaluation* of non-railroad property with respect to "true market value" or

<sup>6</sup> The *Lennen* court held that section 306 was intended to provide only what the court characterized as "equalization" relief (meaning relief from de jure discrimination, or de facto discrimination accomplished through undervaluation of non-railroad property). 715 F.2d at 497. The court expressly stated that "valuation" relief (i.e., relief from de facto discrimination accomplished through overvaluation of railroad property) did not fall within the scope of section 306. *Id.* Although the court set forth its statutory construction in categorical terms, it nevertheless proceeded to fashion the "intentional discrimination" test at issue as a jurisdictional prerequisite for discriminatory state taxation claims based upon overvaluation. *Id.* at 498.

through state *overvaluation* of railroad property with respect to "true market value." To hold, as the *Lennen* Court did, that Section 306 directly prohibits the results of one type of discrimination, but not the other (absent a "strong showing" of discriminatory intent) creates an unwarranted distinction where none was made by Congress, and simply cannot be squared with the general statutory language used, which applies equally to proscribe the consequences of both forms of discrimination.

Moreover, contrary to the findings of the *Lennen* court, the statutory scheme clearly demonstrates that Congress, through enactment of Section 306, fully contemplated and intended that the federal courts would be required to consider valuation claims pertaining to railroad property where relevant to a Section 306 discrimination claim. Section 306 (2) (d) specifically provides, without exception, that "the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable state law." Section 306 (2) (d). Because proof of assessment ratio discrimination necessarily requires a showing of disparate "assessed value/true market value" ratios *between* railroad and nonrailroad property, it is evident that Congress, in enacting the burden of proof requirements of Section 306 (2) (d), fully and necessarily intended that such requirements would govern proof of "assessed value" and "true market value" for *both* railroad and nonrailroad property.<sup>7</sup> Congress thus fully anticipated, and made general provision for, proof of "true market value" of railroad

<sup>7</sup> Moreover, the legislative history makes clear that Congress viewed true market value as an objective, single standard against which assessed values would be compared in determining discrimination claims under Section 306. See, S. Rep. No. 1483, 90th Cong., 2d Sess. 10, 22 (1968); S. Rep. No. 91-630 at 25. As such, district courts would necessarily have to make an independent determination of true market value where necessary to provide effective relief under Section 306: to take the states' determination as conclusive would be self-defeating.

property as relevant to Section 306 overvaluation claims. Any contention to the contrary is simply unsupportable given the inclusive and specific statutory language used and the broad legislative purpose of Section 306 "to eliminate . . . discriminatory state and local taxation."\*

***D. The "Discriminatory Intent" Test Applied By The Court Below Provides A Ready Means By Which State Tax Authorities May Negate The Federal Remedies Provided By Section 306***

Not only is the "discriminatory intent" requirement imposed by the court below contrary to the language and purpose of Section 306, it also provides an easy means by which state authorities may negate the federal remedies against state tax discrimination provided by Section 306.

As is apparent, state tax authorities, by systematic valuation of railroad property in excess of true market value, may achieve discriminatory results *identical* in scope to that obtainable through other forms of discrimination proscribed by Section 306 (e.g., application of a higher tax rate to railroad property or systematic undervaluation of nonrailroad property). Yet, under the *Len-nen* rationale, such discriminatory overvaluation, unlike other forms of discrimination, would not provide a basis for a claim under Section 306 unless the railroads could, by a "strong prima facie case", demonstrate "discriminatory intent" as well as discriminatory impact.

As exemplified by the District Court decision below, the "discriminatory intent" requirement requires the rail-

\* The only specific limitation established by Congress with respect to the jurisdiction of federal courts to enjoin discrimination claims is set forth in Section 306(2)(c). That provision provides that "no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction."

roads to challenge and rebut not only the correctness, but also the "good faith" of the valuation methodologies and procedures used by state tax authorities. Pet. App. at 9a, 16a. Such a jurisdictional requirement, which permits state authorities ample opportunity to devise "good faith" valuation methodologies that in fact systematically discriminate against railroad property, provides a ready loophole through which state tax authorities may channel discriminatory tax efforts free from federal interference. Indeed, in the instant case the District Court, in denying relief under Section 306, found that "there is some indication that the Plaintiffs' property has in fact been overvalued." Pet. App. at 16a.

As Congress noted in the course of enacting Section 306, "interstate carriers, especially railroads, are easy prey" for state discriminatory tax practices. S. Rep. No. 92-1085, at 4; see also S. Rep. No. 91-630, at 3.

They are non-voting, often non-resident targets for local taxation, and cannot remove their rights-of-way and terminals even if the burden of tax discrimination becomes heavy. Their statutory obligation as regulated common carriers further roots them to their location since they are obliged to provide service to the locality. Railroads are particularly subject to discriminatory taxation since they have the largest investment in fixed plant . . .

S. Rep. No. 92-1085, at 4.

Indeed, for the year 1981 (the last year for which such figures are publicly available), the assessed value of railroad assets subject to state ad valorem taxes in all state jurisdictions totalled \$6,624,000,000. *1982 Census of Governments*, U.S. Department of Commerce, Bureau of the Census, at Table 2, p.3. For states within the Tenth Circuit, the 1981 assessed value of such railroad property totalled \$558,000,000. *Id.* These figures do not include the assessed value of locally assessed railroad property. Moreover, the potential revenues available to



states through ad valorem property taxes on railroads are enormous. In 1985, based on aggregate Class I railroad figures set forth in Annual Reports (R-1) filed with the Interstate Commerce Commission, total ad valorem taxes assessed in 1985 for all Class I railroads in all state jurisdictions totalled \$232,294,000. Thus, the incentive for state tax discrimination is as great today as it was in 1976 when Congress first enacted Section 306.

As the legislative history makes clear, Congress specifically enacted Section 306 because it found that the states, if left to their own devices, would not take effective action against discrimination against railroad property. See, e.g., S. Rep. No. 91-630, at 7-8; S. Rep. No. 92-1085, at 4. The *Lennen* decision, by imposition of the restrictive "discriminatory intent" requirement for discriminatory overvaluation claims, brings the legislative process around full circle by providing the states a ready means of imposing discriminatory taxes while totally avoiding federal injunctive remedies under Section 306.

## II. The Decision Below Conflicts With Those Of Other Circuits

Contrary to the *Lennen* decision relied upon by the court below, which found "it . . . by no means clear that § 306 was intended to provide relief from every form of de facto discrimination" (715 F.2d at 497), every other circuit that has considered the issue has concluded that the purpose of Section 306 was "to prevent tax discrimination against railroads in any form whatsoever" and in "all of its guises." *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981); *Trailer Train Co. v. Bair*, 765 F.2d 744, 745 (8th Cir. 1985); *Richmond, Fredericksburg v. Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985); *Alabama Great Southern Railroad Co. v. Eager-ton*, 663 F.2d 1036, 1040 (11th Cir. 1981); *Southern Railway Company v. State Board of Equalization*, 715

F.2d 522, 528 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). Indeed, consistent with the scope and purpose of Section 306 recent decisions of both the Eighth and Ninth Circuits have *specifically rejected* the "discriminatory intent" test fashioned by the *Lennen* court as a jurisdictional bar to a Section 306 claim based upon discriminatory overvaluation.

In *Burlington Northern R. Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985), the Eighth Circuit considered a Section 306 tax discrimination claim by BN alleging that the state had engaged in unlawful tax discrimination through tax assessments which valued BN's property in excess of true market value while other commercial and industrial property in the state were assessed for tax purposes at lower levels. BN claimed that as a result of such state valuation practices the ratio of assessed value to true market value of BN's property exceeded the ratio of assessed value to true market value of all other commercial and industrial property in the state by at least five percent contrary to the non-discrimination requirements of Section 306. *Id.* at 1225. State tax authorities, in response to BN's tax discrimination claim, asserted in defense that Section 306 did not confer jurisdiction on the federal courts to review state valuations of *either* railroad or other commercial property to determine if assessed value/true market value ratios were in fact "equalized" between railroad property and other commercial and industrial property in the state. *Id.*

The Eighth Circuit, finding that review of state valuation determinations in the context of ratio discrimination claims brought under Section 306 (which the court broadly characterized as requests for "equalization" relief under Section 306) were *essential* if the nondiscrimination requirements of Section 306 were to be properly implemented, squarely rejected the state's position. *Id.* at 1225-1226. In so doing the Eighth Circuit also squarely rejected the "intentional discrimination" test imposed by



the *Lennen* court as a jurisdictional prerequisite to a Section 306 claim based upon discrimination overvaluation of railroad property. As held by the Eighth Circuit in *Bair*:

[I]f we were to accept the [state's] position, section 306 would be a mere shadow of the relief from discriminatory taxation which Congress intended. See S. Conf. Rep. No. 595, 94th Cong. 2d Sess. 136, 165-66, reprinted in 1976 U.S. Code Cong. & Ad. News 148, 151, 180-81. Unless the district court makes its own findings regarding valuation, states would be free to discriminate against railroads by assessing a value far in excess of the true market value, while assessing all other property at true market value, and then asserting, as Iowa does, that assessed value is always equal to true value. Regardless of whether it occurs purposefully or by honest error, section 306(1)(a) forbids this type of discrimination.

\* \* \*

In order to make the comparison for equalization purposes under section 306(1)(a), the district court must make findings of fact on: (1) the assessed value of plaintiff's property; (2) the true market value of plaintiff's property; (3) "the assessed value of all other commercial and industrial property in the same assessment jurisdiction"; and (4) "the true market value of all such other commercial and industrial property." The district court must calculate the two ratios and determine whether they vary by at least five percent. § 306(2)(c). . . . Because there is no intent element in Section 306, Burlington Northern need only prove the accurate values, not purposeful undervaluation or overvaluation.

766 F.2d at 1225-1226.\*

\* In its decision below, the Tenth Circuit specifically noted that "there is language in [*Bair*] that may be read as inconsistent with our intentional discrimination ruling in *Lennen*" Pet. App. at 3a. The court below, however, in an effort to negate the clear conflict in the circuits, characterized the inconsistent *Bair* language

The decision below is also in direct conflict with a recent Ninth Circuit decision in *Atchison, Topeka and Santa Fe Railway v. Board of Equalization*, 795 F.2d 1442 (9th Cir. 1986) ("*Santa Fe*"). In the *Santa Fe* case, the railroad petitioners brought a tax discrimination suit under section 306 claiming that the "true market value calculated by state tax authorities was higher than the real true market value and therefore they paid higher taxes proportionately than other commercial and industrial property owners." *Id.* at 1445. The railroads further claimed that Section 306 "provided a remedy for discrimination that results from overvaluation of rail transportation property, caused by generally not applying the methodology correctly or by negligently or intentionally inflating figures." *Id.* The Ninth Circuit, in categorically upholding the railroads' discriminatory overvaluation claim under Section 306, held as follows:

as "dicta" and noted that the *Bair* decision had also specifically distinguished the *Lennen* case. Pet. App. at 3a.

The effort of the court below to reconcile the *Lennen* and *Bair* decisions, however, is patently unpersuasive. First, the *Bair* court specifically remanded the case to the district court to correct its error "in failing to make findings of fact on assessment values and true market values." 766 F.2d at 1226-1227. Far from constituting *dicta*, therefore, the language cited in *Bair* regarding the need for true market value findings in Section 306 cases based on claims of discriminatory overvaluation of railroad property is in fact the *direct holding* of that case. Second, although the *Bair* case refers to the *Lennen* case as "dealing with overvaluation claims rather than the equalization claim at issue in the present case [766 F.2d at 1225]," the distinction is wholly semantical. Both cases in fact involved requests for "equalization" relief based upon discriminatory overvaluation of railroad property in relation to other commercial and industrial property in the state. Moreover, the *Bair* court (in remanding the case for valuation determinations) resolved the issue in a manner directly in conflict with the *Lennen* court (which interposed the "intentional discrimination" test as a jurisdictional bar and affirmed the district court's dismissal of BN's request for injunctive relief).

We conclude that the district court erred in holding that the railroads' valuation challenge was outside the scope of the 4-R Act. The 4-R Act gives federal district courts the power to enjoin certain discriminatory state taxation practices, 49 U.S.C. § 11503(c). Section 11503 specifically refers to the "true market value" of rail property and identifies that factor as an integral element of the statutory test for discriminatory taxation. The normal presumption is that true market value—like all factual issues bearing on a claimed statutory violation—would be open to dispute and proof before a federal court hearing a 4-R Act claim. Therefore, the statute confers federal jurisdiction to hear challenges to the state's calculation of the railroad property's true market value.

*Id.* at 1445.

The Ninth Circuit also specifically addressed and rejected the "intentional discrimination" jurisdictional test adopted by the *Lennen* court:

The purposes of the 4-R Act . . . support the power of the district court to hear the valuation claim involved here. Congress enacted the statute to end what it perceived to be the pervasive and longstanding practice of discriminatory taxation of railroads. Given the important remedial objective of the legislation, it is implausible to assert that the Act was not intended to provide relief from every form of de facto discrimination. Such a holding would frustrate the purposes of the statute and lead to irrational consequences.

Indeed, the only circuit to consider a claim of overvaluation recognized that such claims were cognizable under the Act, albeit only if a certain threshold showing was made. See *Burlington Northern R. Co. v. Lennen*, 715 F.2d 494, 498 (10th Cir. 1983) (holding that railroad could prevail on an overvaluation claim in federal courts provided it "can make a strong showing of a purposeful overvalua-

tion of a particular railroad's property with discriminatory intent"), *cert. denied*, 104 S.Ct 2690 (1984). We decline to adopt the Tenth Circuit's threshold requirement; however, we agree that federal courts have jurisdiction over claims of rail property overvaluation.<sup>10</sup>

*Id.* at 1446; see also *Louisville & Nashville R. Co. v. Dept. of Rev. Etc.*, 736 F.2d 1495, 1498 (11th Cir. 1984) (noting generally that "[d]iscriminatory intent is not a precondition to recovery [under Section 306] once disparate impact is shown"); *Southern Ry. Co. v. State Board of Equalization*, 715 F.2d 522, 527 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) ("Congress meant unconditionally to ensure a federal forum for Section [306] claims," including cases "alleging de facto discrimination as well as de jure.")

Based upon the statutory language, legislative history and inclusive remedial purpose of Section 306, this Court should reverse the decision below as contrary to the requirements of Section 306 and as inherently disruptive of the federal statutory scheme. Moreover, because the decision below is in direct conflict with those of other circuits, reversal by this Court is necessary to ensure the uniform and proper administration of Section 306 by the federal judiciary and to provide railroads operating within the Tenth Circuit an effective federal remedy against state tax discrimination as Congress intended.

<sup>10</sup> The panel majority in the *Santa Fe* case, however, found that the district court should abstain from determining the merits of the valuation issue until the conclusion of pending state valuation cases. *Id.* at 1448. The court reasoned that although "Congress intended the 4-R Act to provide a federal remedy for discriminatory state taxation of railroad property," the railroads "cannot be heard to complain if a federal court defers to a state court in which the railroads themselves first sought relief." *Id.* A petition for rehearing on the abstention issue in *Santa Fe* was filed August 14, 1986; responsive briefs have been filed and the petition is currently awaiting decision by the court.

**CONCLUSION**

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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December 12, 1986



**MOTION FILED**  
**DEC 11 1986**

No. 86-337

(10)

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

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BURLINGTON NORTHERN RAILROAD COMPANY,  
*Petitioner,*

v.

OKLAHOMA TAX COMMISSION, *et al.*,  
*Respondents.*

---

On Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

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**MOTION FOR LEAVE TO FILE A BRIEF  
AMICUS CURIAE AND BRIEF AMICUS CURIAE  
OF THE AMERICAN BUS ASSOCIATION  
IN SUPPORT OF PETITIONER**

---

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December 12, 1986

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On Writ of Certiorari to the United States  
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**MOTION OF THE AMERICAN BUS ASSOCIATION  
FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE***

---

The American Bus Association ("ABA") respectfully moves this Court for leave to file the attached Brief *Amicus Curiae*.<sup>1</sup> ABA is a national trade association, the membership of which includes approximately 700 intercity bus companies located throughout the United States. One of ABA's primary responsibilities is to represent its members in Congress and in the courts on matters of general applicability to the bus industry.

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<sup>1</sup> Petitioner has consented to the filing of ABA's brief, and the letter containing such consent has been filed with the Clerk. However, Respondents have withheld consent, and accordingly this motion for leave to file the ABA brief is submitted.

The Tenth Circuit decision in this case could have a serious, detrimental effect on intercity bus companies. The court construed the prohibition against discriminatory state tax treatment of railroad property contained in Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"), Pub. L. No. 94-210, 90 Stat. 31, 54 (codified at 49 U.S.C. § 11503 (1982)), in an unduly restrictive manner. It found that Section 306 confers federal court jurisdiction in cases of discriminatory overvaluation of railroad property only when there is a strong pretrial showing of purposeful overvaluation with discriminatory intent. Petitioner's Appendix at 2a.

A parallel provision, 49 U.S.C. § 11503a, governs the bus industry. Motor carriers of passengers were brought under the protection of this provision by Section 20 of the Bus Regulatory Reform Act of 1982 ("the BRRA"). Pub. L. No. 97-261, 96 Stat. 1122 (1982).<sup>2</sup>

Since the language of Sections 11503 and 11503a is very similar, the Circuit Court's decision is very likely to serve as precedent for future judicial decisions in the Tenth Circuit construing § 11503a and could well serve as precedent for decisions in other jurisdictions. The likelihood of this decision being followed as precedent in Section 11503a cases is enhanced by the fact that there are no reported Circuit Court decisions interpreting Section 11503a.

ABA was the principal industry representative in the Congressional proceedings leading up to the passage of the BRRA and is thus uniquely able to address both the Congressional intent in promulgating Section 20 of the BRRA and the detrimental effects on the bus industry of an unduly restrictive interpretation of the parallel railroad provision.

<sup>2</sup> Section 11503a, as originally enacted by the Motor Carrier Act of 1980, Pub. L. No. 96-296, § 26(a)(1), 94 Stat. 823, applied only to motor carriers of property.

ABA's presentation of views on behalf of the bus industry in support of petitioner will show that the Tenth Circuit decision could deprive the bus industry of valuable protection granted by the BRRA. It will also demonstrate that the stated Congressional intent in passing Section 11503a provides further support for Petitioner's position concerning Congressional intent underlying the very similar language of Section 306 of the 4-R Act.

Respectfully submitted,

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December 12, 1986



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IN THE  
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BRIEF *AMICUS CURIAE*  
OF THE AMERICAN BUS ASSOCIATION  
IN SUPPORT OF PETITIONER  
\_\_\_\_\_

INTEREST OF THE *AMICUS CURIAE*

The American Bus Association is the national trade association of the intercity bus industry. ABA represents the majority of the Class 1 bus companies operating in the United States.<sup>1</sup> A primary purpose of ABA is to

<sup>1</sup> The Interstate Commerce Commission defines Class 1 bus companies as those with more than \$3,000,000 in annual revenue. 49 C.F.R. § 1206.2-1 (1985).

A list of all Class 1 bus companies that are ABA members appears in the attached Appendix.

advocate the enactment of uniform, just and proper laws applicable to the bus industry and reasonable and equitable administration of those laws. ABA By-Laws at Section 1(b) (Oct. 2, 1985).

The law that fundamentally changed federal and state regulation of the intercity bus industry was the Bus Regulatory Reform Act of 1982 ("the BRRA"), Pub. L. No. 97-261, 96 Stat. 1102 (1982) (codified in scattered sections of 49 U.S.C.). Section 20 of the BRRA included motor carriers of passengers in the protection against state tax discrimination contained in 49 U.S.C. § 11503a. Pub. L. No. 97-261, § 20, 96 Stat. 1122 (1982). Section 11503a(b) makes it unlawful for states to:

- (1) assess motor carrier transportation property at a value that has a higher ratio to the true market value of the motor carrier transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;
- (2) levy or collect tax on assessment that may not be made under paragraph (1) of this subsection;
- (3) levy or collect an ad valorem property tax on motor carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

Thus, this provision protecting motor carriers of passengers is very similar to Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"), Pub. L. No. 94-210, 90 Stat. 31, 54 (codified at 49 U.S.C. § 11503 (1982)), which is the subject of this proceeding. In language similar to Section 11503, Section 11503a gives district courts of the United States jurisdiction "to prevent a violation of subsection (b) of this section" and provides that the "burden of proof in determining assessed value and true market value is governed by State law." Section 11503a(c).

In the present case, the Circuit Court upheld the District Court's decision that in cases involving alleged overvaluation of railroad property for assessment purposes, District Court jurisdiction existed only if plaintiffs could make before trial "a strong showing of intentional discrimination" in the valuation process and that Burlington Northern failed to meet that standard. Petitioner's Appendix at 12a, 14a. Given the substantial similarity of Sections 11503 and 11503a, this decision could serve, particularly in the Tenth Circuit, as precedent for courts interpreting Section 11503a and could lead to significant limitations on the rights of motor carriers of passengers under Section 11503a.

The possibility of such an occurrence is enhanced by the lack of case law interpreting Section 11503a. The only two reported cases are the related cases of *Arkansas-Best Freight System v. Cochran*, 546 F. Supp. 904 (M.D. Tenn. 1981) (Cochran I) and *Arkansas-Best Freight System v. Cochran*, 546 F. Supp. 915 (M.D. Tenn. 1982) (Cochran II). The court in Cochran I described Sections 11503 and 11503a as "virtually identical", 546 F. Supp. at 910, and the court in both cases cited as controlling precedent, federal court decisions interpreting Section 11503. 546 F. Supp. at 910; 546 F. Supp. at 918.

Thus, the ruling of the court below, which misinterprets Section 11503 and which conflicts with several other federal court decisions, could severely restrict the Section 11503a protection against discriminatory state taxes provided to ABA members. For this reason, ABA strongly supports the Petitioner's position.

### SUMMARY OF ARGUMENT

There is no statutory basis for the Tenth Circuit's distinction between state discriminatory taxes based on assessment discrimination and state discriminatory taxes based on valuation discrimination, nor for its determina-



tion that jurisdiction does not lie in valuation discrimination cases unless purposeful overvaluation with discriminatory intent on the part of the state is shown before trial. The plain language of Section 11503 and the parallel statute governing motor carriers, and the legislative history of Section 11503a demonstrate conclusively congressional intent to prohibit state taxes that discriminate against motor carriers whatever the methodology or intent and to provide a federal judicial remedy for all such discrimination. Section 11503a and its legislative history therefore lend support to Petitioner's position that Section 11503 does not have the threshold jurisdictional limitations imposed by the Tenth Circuit when valuation discrimination is involved.

#### ARGUMENT

Like the 4-R Act, the BRRA removed the effect on interstate motor carriers of passengers of a broad range of unreasonable or discriminatory state laws or regulatory actions. The comprehensive legislative framework adopted by Congress in the BRRA included provisions enabling bus carriers to overturn or avoid unreasonable or discriminatory regulatory actions limiting entry into or exit from intercity bus service or requiring intrastate rate levels below those of the interstate level. Pub. L. No. 97-261, §§ 6, 16, & 17. 96 Stat. 1102, 1103, 1115, 1117 (codified at 49 U.S.C. §§ 10922(c)(2), 10935, 11501 (e) & (f) (Supp. 1985)). None of these provisions requires that discriminatory state intent be shown before jurisdiction under the provision can be invoked.

Section 20 of the BRRA, as part of this overall legislative framework, enables motor carriers of passengers to avoid the effects of discriminatory state taxation by bringing these motor carriers under the broad protection of Section 11503a, which previously had been enacted for the benefit of motor carriers of property by the Motor Carrier Act of 1980, Pub. L. No. 96-796, § 31, 94 Stat.

793, 823 (1980) (codified at 49 U.S.C. § 11503a (Supp. 1985)).

As with other provisions of the BRRA, Section 11503a contains nothing that would indicate that discriminatory intent on the part of the state is a jurisdictional prerequisite. It simply states that a State "may not" assess motor carrier transportation property at a higher value to true market value ratio than the ratio assigned to other commercial and industrial property and may not levy or collect a tax based on that assessment. Section 11503a(b)(1). The statute goes on to give district courts of the United States jurisdiction with other federal and state courts "to prevent a violation of subsection (b) of this section". Section 11503a(c). There is nothing in the statute that qualifies this jurisdiction by means of a special burden of proof imposed on plaintiffs in valuation cases. In fact, rather than creating a special jurisdictional burden of proof, the statute provides that the "burden of proof in determining assessed value and true market value is governed by State law". *Id.*

Likewise, the legislative history makes it clear that Section 20 of the BRRA was intended to give motor carriers of passengers blanket protection against discriminatory state taxes under Section 11503a. The House Report, which originated Section 20 of the BRRA, states unequivocally:

this provision makes current law which prohibits the assessment, levying or collecting of taxes on motor carrier property in a manner different from that of other commercial and industrial property applicable to motor carriers of passengers.

H.R. Rep. No. 334, 97th Cong., 1st Sess. 47 (1981).

The Tenth Circuit decision below also conflicts with the decisions in *Cochran I* and *Cochran II*, both of which overturned discriminatory application of state taxes against motor carriers without regard to the intent or

particular form of the discrimination. 546 F. Supp. at 915; 546 F. Supp. at 919.

In sum, the Tenth Circuit decision below conflicts not only with the plain meaning and legislative history of Section 11503 and the decisions of other circuits interpreting that statute, the decision also conflicts with the plain meaning and legislative history of Section 11503a, the parallel provision for motor carriers, and the judicial decisions that have interpreted that provision.

### CONCLUSION

The Court should reverse the order and judgment of the Tenth Circuit Court of Appeals and should remand the case for consideration of Petitioner's Section 306 claim without regard to the discriminatory intent, or lack thereof, of Respondents.

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December 12, 1986

### APPENDIX

#### CLASS 1 BUS COMPANY AMERICAN BUS ASSOCIATION MEMBERS

Trailways Lines, Inc.  
Carolina Coach Company  
Short Line-Hudson Transit Lines  
Bonanza Bus Lines  
Jefferson Lines, Inc.  
Las Vegas-Tonopah-Reno Stage Line, Inc.  
Adirondack Trailways  
Gold Line, Inc.  
Frank Martz Coach Company (Martz Trailways)  
Capitol Trailways of Pennsylvania  
Blue Bird Coach Lines, Inc.  
Oklahoma Transportation Company, Inc.  
Peter Pan Bus Lines, Inc.  
Carl R. Bieber, Inc.  
Eyre Bus Service, Inc.  
Harran Transportation Co.  
M K & O Coach Lines  
Pacific Trailways  
Starr Tours  
Blue & White Lines, Inc.  
Jack Rabbit Lines, Inc.  
Southeastern Trailways, Inc.  
Capital Motor Lines  
The Arrow Line, Inc.  
Panhandle Trailways  
Seashore Transportation Co.  
Intermountain Transportation Company  
Continental Air Transport  
Connecticut American Charters  
Michigan Trailways  
Voyageur Enterprises Ltd.

JAN 28 1987

JOSEPH F. SPANIOL, JR.  
CLERK

# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1986

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AMICI CURIAE BRIEF OF THE STATES OF  
CALIFORNIA, COLORADO, FLORIDA, IOWA,  
MINNESOTA, MONTANA, NEBRASKA, NEVADA,  
NORTH CAROLINA, OREGON, SOUTH CAROLINA,  
SOUTH DAKOTA, TENNESSEE, VIRGINIA,  
WASHINGTON AND WYOMING

IN SUPPORT OF RESPONDENTS

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## **QUESTION PRESENTED**

Whether, in addition to covering state assessment ratio discrimination and state tax rate discrimination, section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. § 11503) also gives any jurisdiction to the federal courts to review claims of valuation discrimination regarding state determinations of market value of railroad property.

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No. 86-337

## In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Petitioner,*

v.

OKLAHOMA TAX COMMISSION, et al.,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

AMICI CURIAE BRIEF OF THE STATES OF  
CALIFORNIA, COLORADO, FLORIDA, IOWA,  
MINNESOTA, MONTANA, NEBRASKA, NEVADA,  
NORTH CAROLINA, OREGON, SOUTH CAROLINA,  
SOUTH DAKOTA, TENNESSEE, VIRGINIA,  
WASHINGTON AND WYOMING

IN SUPPORT OF RESPONDENTS

## INTEREST OF AMICI CURIAE

The State of California on behalf of the California State Board of Equalization submits this brief as *amicus curiae* in support of respondent the Oklahoma Tax Commission. Supreme Court Rule 36.4 allows California to file this brief without obtaining the consent of the parties. The following States join California in this brief: Colorado, Florida, Iowa, Minnesota, Montana, Nebraska, Nevada, North Carolina, Oregon, South Carolina, South Dakota, Tennessee, Virginia, Washington and Wyoming.

The California State Board of Equalization is a defendant in a number of consolidated actions now pending in which the plaintiffs—all the major railroads and railroad car companies operating in California, including petitioner Burlington Northern in this appeal—seek relief under Section 306 of the 4-R Act.<sup>1</sup> An interlocutory appeal in that litigation resulted in *Atchison, Topeka & Santa Fe Ry v. Board of Equalization*, 795 F.2d 1442 (9th Cir. 1986), in which the Ninth Circuit held that section 306 does encompass valuation claims.<sup>2</sup> The Ninth Circuit's decision directly conflicts with the decision of the Tenth Circuit below.

As a general matter, California and the other amici states are concerned that an overly broad interpretation of section 306 will lead to the excessive intrusion of the federal courts into the internal tax affairs of the states.

### SUMMARY OF ARGUMENT

There are several stages to the determination of a property tax liability. First, valuation procedures are used to reach an appraisal of the market value of the property. Second, an assessment ratio often is applied to the market value, resulting in an assessed value which is a percentage of the market value. Finally, a tax rate is applied to the assessed value to reach the actual amount of property taxes attributable to that property.

Section 306 was enacted in part to provide equalization relief from *assessment ratio* discrimination, sometimes termed *equalization* discrimination—the practice of certain states of setting the

<sup>1</sup> The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, codified as 49 U.S.C. § 11503. The differences between section 306 and its codified version are recognized to be of no significance. *Trailer Train v. State Bd. of Equalization*, 697 F.2d 860, 862 n.1 (9th Cir. 1982), *cert. denied*, 464 U.S. 846 (1983). The text of section 306 is attached as an appendix to this brief.

<sup>2</sup> The Ninth Circuit also held that the District Court should abstain from plaintiffs' valuation claims pending the outcome of tax refund actions which plaintiffs had brought in the state courts. A petition for rehearing is pending in *Santa Fe*.

assessed value of rail transportation property by using a higher percentage of market value than the assessment percentage which is applied to other property. For example, under state law railroad property might be assessed at 50% of market value while other property is assessed at 40% of market value. No one disputes that section 306 was intended to give the federal courts jurisdiction over claims of assessment ratio discrimination.

Similarly, there is no dispute that section 306 also was enacted to provide relief from *tax rate* discrimination, wherein a state might subject the assessed value of railroad property to a higher tax rate than is applied to the assessed values of other property.

Issues of *valuation* discrimination, on the other hand, have nothing to do with assessment ratio discrimination or tax rate discrimination; in contrast, valuation discrimination would result from appraisals which exceed market value. Railroad property typically is appraised by such methods as the income capitalization method and the cost method. Claims of valuation discrimination therefore involve such matters as the prediction of future income and the treatment of track maintenance expenses.

There is a long tradition of federal noninterference in the internal tax affairs of the states. If Congress had intended to depart from this tradition by empowering the federal courts to act as appraisal appeal panels over valuation decisions of state taxing agencies, one would expect to find some evidence in the legislative history that Congress believed the railroads to be the victims of valuation discrimination. Similarly, if Congress expected the federal courts to create a federal common law of appraisal standards, one would expect to find some discussion of what form that body of law should take. But there is no mention of either topic in the history, which instead establishes that:

— Not once in the fifteen years of deliberation did Congress criticize state valuation procedures;

— Representatives of the railroad industry repeatedly told Congress that they had no complaints over the way the states valued their property;



— These representatives also told Congress that the proposed legislation would not apply to valuation disputes;

— While Congress concluded that assessment discrimination cost the railroad industry millions of dollars a year in excess tax, not one penny of excess tax was attributed to valuation discrimination;

— Congress was concerned about the intrusive effect of the legislation into the internal affairs of the states;

— Congress never expected the federal courts to create a federal common law of appraisal standards.

Nor does the language of section 306 support a broad interpretation. The language in subsections (1)(a)-(c) makes sense only in terms of relief from the assessment ratio discrimination and tax rate discrimination which Congress had in mind. Subsection (1)(d) does nothing more than expand the scope of the statute to nonproperty taxes. The burden of proof language in subsections (2)(d) and (2)(e), which the Ninth Circuit cited in *Santa Fe*, simply refers to the manner in which a claim of assessment ratio discrimination or tax rate discrimination is to be proven.

While the policy behind section 306 is to protect the railroad industry against discriminatory state taxation, that policy does not require giving the federal courts jurisdiction over valuation disputes because, as Congress recognized, the industry has adequate remedies in the state courts under state laws requiring fair market appraisals. However, the state courts cannot overturn state laws requiring assessment ratio discrimination or tax rate discrimination unless that discrimination reaches unconstitutional levels, and it is for that reason that Congress gave the federal courts jurisdiction over that type of claim.

## ARGUMENT

### I

## SECTION 306 DOES NOT ENCOMPASS CLAIMS OF DISCRIMINATORY VALUATION

### A. The Legislative History

While at first impression the language of section 306 may seem cumbersome, an examination of the legislative history shows that the language is precisely tailored to deal with the specific problem which the railroad industry asked Congress to remedy.<sup>3</sup> That problem was the so-called "classification systems" in many states which placed different types of property into different classifications, each classification being assessed or taxed at a different rate, and rail transportation property typically being placed in the higher classification. The Senate Committee on Commerce described the problem as follows:

"For example, a State may assess railroad property for tax purposes at 100 percent of value, and other property at only 40 percent of such value; and, a State may subject rail property at a rate of \$1 per \$1,000 of assessed valuation, and other property subject to the same tax purpose at a rate of \$0.50 per \$1,000 of assessed valuation." (*Discriminatory State Taxation of Interstate Carriers*: S. Rep. No. 1483, 90th Cong., 2d Sess. 3 (1968).)<sup>4</sup>

A witness invited by the railroads told Congress that the equalization complaint they had about the states was:

<sup>3</sup> The history of the bills which evolved into section 306 may be considered in interpreting section 306. *Trailer Train v. State Board of Equalization*, 697 F.2d at 865 n.6. See *supra* note 1.

<sup>4</sup> See also *Discriminatory State Taxation of Interstate Carriers*: S. Rep. No. 92-1085, 92d Cong., 2d Sess. 5 (1972); *State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before The Subcomm. on Surface Transportation of the Senate Comm. on Commerce*: 91st Cong., 1st Sess. 62-63 (1969); *National Transportation Policy*: S. Rep. No. 445, 87th Cong., 1st Sess. 486 (1961).



"that consistently railroads are taxed at or close to the equalization level that has been announced by the State, whereas local property is typically assessed at a considerably lower level." (*State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 62 (1969).)

A consistent theme in the legislative history is Congress' fear that the proposed legislation would result in federal court review of state valuation decisions. As Senator Lausche observed, assigning that role to the federal courts would "raise serious questions of policy." (S. Report No. 1483, *supra* p. 5, at 26.) Similar fears were expressed by the Interstate Commerce Commission and by representatives of the states. See *Tax Assessments on Common Carrier Property: Hearings on H.R. 736 and H.R. 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 2d Sess. 2-3 (1964); *Discriminatory Taxation of Common Carriers: Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 87 (1967).

Congress also expressed doubts about the constitutionality of the proposed legislation in view of decisions of this Court, including *Moses Lake Homes v. Grant County*, 365 U.S. 744 (1961), holding that the federal courts may not assess or levy state taxes. See S. Report No. 1483, *supra* p. 5, at 11-12; *Discriminatory State Taxation of Interstate Carriers*: S. Report No. 91-630, 91st Cong., 1st Sess. 12-13 (1969).<sup>5</sup>

Perhaps recognizing that the passage of the legislation was threatened by these concerns, representatives of the railroad industry repeatedly assured Congress that the bill would only provide equalization relief and would not reach to valuation disputes. Philip Lanier, the vice-president of the Louisville &

<sup>5</sup> In fact the Senate Committee on Commerce concluded that the legislation would not be invalid under *Moses Lake* because "S. 927 does not require or direct that the Federal judge perform the tax assessment or tax-levying function." S. Report No. 1483, *supra* p. 5, at 12.

Nashville Railroad Co., and chairman of the Association of American Railroads committee that prepared its congressional presentation, testified:

"On the valuation—this bill would not deal with valuation being standard. The standards and methods of valuation that any State wishes to use would be totally unaffected by this legislation."

"...."

"... [I]t is only in the area of equalization of the computed value that this legislation speaks." (*Common and Contract Carrier State Property Tax Discrimination: Hearing on H.R. 16245, H.R. 16251, H.R. 16316, H.R. 16357, H.R. 16411 and H.R. 16639, and S. 2289 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 9, 138-139 (1970).)

His testimony was echoed by another representative of that organization, James N. Ogden:

"The principal problem in the matter of railroad assessments is not one of how to value a railroad. In the hundred-year history of railroad taxation, the practice of valuing railroads for tax purposes has reached a substantial degree of refinement." (*Hearings on H.R. 736 and H.R. 10169, supra*, p. 18.)<sup>6</sup>

In his written testimony Mr. Ogden removed any doubt about the scope of the proposed legislation:

"Let me emphasize that H.R. 736 does not suggest or require a State to change its assessment standards, assessment practices, or the assessments themselves." (*Hearings on H.R. 736 and H.R. 10169, supra* p. 6, at 52.)

<sup>6</sup> When asked whether the railroads had "actually experienced any difficulty in the various States on the assessment of your personal property or rolling stock," Mr. Ogden replied: "No, sir, not now...." *Hearings on H.R. 736 and H.R. 10169, supra* p. 6, at 31.

There can be no doubt that Congress accepted the railroads' assurances. The Senate Committee on Commerce issued two reports describing the scope of the proposed legislation, and neither mentions valuation discrimination. (S. Rep. No. 1483, *supra* p. 5, at 3; S. Rep. 91-630, *supra* p. 6, at 3.) Instead the committee described discriminatory taxation as arising in "two ways", assessment ratio discrimination and tax rate discrimination, and "emphasize[d] that this bill would in no way alter the freedom of a State to tax its taxpayers so long as interstate carriers are accorded equal tax treatment with other taxpayers." (S. Rep. No. 1483, *supra* p. 5, at 3, 14; S. Rep. No. 91-630, *supra* p. 6, at 3, 15.)

What this Committee meant is that the federal courts would act if necessary to prevent the states from assessing railroad property with discriminatory assessment ratios or tax rates but would not take over the value appraisal functions of the states. This clear expression of congressional intent is dispositive of the question before this Court.

#### **B. The Errors in the Railroads' Legislative History Argument**

Perhaps the most telling defect in the railroads' position is their inability to find in the legislative history any evidence that Congress thought the states were over appraising the value of railroad property or any suggestion as to how those appraisals should be conducted. The legislation was before Congress for fifteen years, and surely there would have been at least some discussion of these topics along the way if section 306 was intended for the purposes which the railroads now have in mind.

Lacking such support, the railroads must instead rely on descriptions of the legislative history which we submit are mischaracterizations:

1. The railroads cite a Congressional committee finding to the effect that the railroad industry was "over-taxed by at least \$50 million each year." (*Rail Revitalization and Regulatory Reform Act of 1975*: H.R. Rep. No. 94-725, 94th Cong. 1st Sess. 78 (1975).) However, as the text accompanying this finding makes clear, Congress attributed the loss

solely to assessment ratio or tax rate discrimination; there is no mention of valuation discrimination.

Nowhere in the legislative history is there even a suggestion that valuation discrimination cost the railroads as much as a single penny.

2. Railroads likewise cite a statement in a Senate report that railroads "are easy prey for State and local tax assessors." S. Rep. No. 91-630, *supra* p. 6, at 3. That remark appears in the first paragraph in a section of the report entitled "Background." In the fifth paragraph of the same section the authors explain that what they had in mind was assessment ratio discrimination or tax rate discrimination. *Id.* There is nothing anywhere in the report about valuation discrimination.

3. Certainly many state and local officials expressed fears that the proposed legislation would reach valuation disputes. It was precisely those fears which the railroads told Congress were groundless. *See supra* pp. 6-7. To put it another way, the railroads are now telling this Court that the fears were well-founded even though the railroads told Congress that such fears were baseless.

4. The railroads refer to an amendment proposed by the Director of Revenue of the State of Washington which would have required the federal courts to accept state-determined appraisals as final. However, in reality the amendment was nothing more than an attachment to the Director's letter to Senator Hartke, it clearly was unnecessary in view of the railroads' assurances, and there is nothing to show that Congress even considered it, let alone rejected it.

5. On page 26 (note 38) of the Brief for Petitioner, the railroads rely on an off-hand remark by Broley E. Travis, a former valuation engineer of the California State Board of Equalization, who after his retirement was hired by the railroads as a consultant. At the conclusion of his prepared testimony before Congress, he answered a question by stating that the federal courts would have to determine the value as the first step in the equalization process. However, as he



himself admitted, his response was given as "an engineer, and not an attorney," and he did not purport to give the response as the official position of the railroad industry. *Hearing on S. 2289, supra* p. 5, at 59. At least one court has recognized that Mr. Travis' views were not accepted by Congress. (*Burlington N. R.R. v. Lennen*, 573 F.Supp. 1155, 1163 (D. Kan. 1982), *aff'd.*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984).)

## II

### THE PLAIN LANGUAGE OF SECTION 306 DOES NOT REACH VALUATION DISPUTES

Even the railroads must admit that, if Congress had intended the federal courts to sit in review of state tax agencies to develop a federal common law of appraisal, it could have done so easily by including in the statute a simple phrase such as:

"It is prohibited to appraise railroad property at more than market value."

In fact there is no such language in section 306 or anything resembling it. The railroads are therefore forced to ask this Court to make inferences from phrases in section 306 which clearly are intended to deal with other matters.

1. The railroads first rely on subsection (1)(d), which prohibits:

"The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part."

This language must be understood in the context of the first three parts of subsection (1), which clearly refer to *property* tax discrimination. Subsection (1)(d) therefore does nothing more than expand the scope of the statute to nonproperty taxes. See *Alabama Great S. R.R. Co. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981) (excise taxes); *Ogilvie v. State Bd. of Equalization, Etc.*, 492 F.Supp. 446 (N.D. 1980), *aff'd.*, 657 F.2d 204 (8th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981) (personal property tax).

Subsection (1)(d) was a last minute addition to the bill which became section 306, and, given the absence of any discussion in the legislative history of its significance, this Court should not conclude that it was intended to be a complete turn-about of what Congress and the railroads previously said the rest of the bill meant.

2. The railroads also rely on the following language in subsection (2)(d):

"[T]he burden of proof with respect to the determination of assessed value and true market value shall be that declared by applicable State law. . . ."

This language must be read in the context of (1)(a), which sets forth the elements of an assessment ratio discrimination claim. These elements consist of proof of the assessed value and the appraised value of both railroad property and nonrailroad property. Subsection (2)(d) simply places the burden of proving those elements on the party, normally the railroad, which would have that burden under state law.<sup>7</sup> It is a *non sequitur* to conclude that, because Congress intended to adopt state law on the burden of proof of proving an assessment ratio discrimination claim, Congress also intended to allow the railroads to raise claims of valuation discrimination even though they told Congress that such discrimination did not exist. Subsection (2)(d) is too slender a reed to support that conclusion.

## III

### THE STATE COURTS OFFER AN ADEQUATE REMEDY

While the railroads argue that their only protection from valuation discrimination lies in the federal courts, the fact is that their state court remedies are entirely adequate. Using California as an example, a taxpayer may after payment of the tax file a refund action in which it may raise any challenge, either factual or legal, to the assessment. The challenges raising questions of law are entitled to a *de novo* hearing in the trial court. Under

<sup>7</sup> Equalization of course is a recognized state law procedure.



California law a challenge to the validity of the methodology, as distinguished from a challenge to the application of the methodology, is considered to raise a legal question. Since California law requires all property to be appraised at fair market value, an appraisal which does not meet that standard is subject to correction by the state courts.

It is true that Congress heard testimony from a representative of the Association of American Railroads to the effect that some state courts on some occasions were reluctant to overturn decisions of state taxing agencies. (S. Rep. No. 1483, *supra* p. 5, at 6). However Congress did not adopt his views and in fact the Chairman of the Interstate Commerce Commission observed that a number of state courts had set aside discriminatory assessments on state law grounds (S. Rep. No. 1483, *supra* p. 5, at 6.) The railroads do not make the reckless charge that state judges are biased against the railroad industry, and it is clear that Congress did not believe that such bias existed.<sup>8</sup>

#### IV

#### **BOTH THE TENTH CIRCUIT'S "INTENTIONAL DISCRIMINATION" TEST AND THE UNITED STATES' "SYSTEMATIC OVERVALUATION" TEST ARE ERRONEOUS; HOWEVER, THE TENTH CIRCUIT'S TEST IS PREFERABLE TO THAT OF THE UNITED STATES**

As shown above, section 306 of the 4-R Act does not give any jurisdiction to the federal courts to review or decide any valuation discrimination claims. Thus this Court should not adopt the Tenth Circuit's ruling that an exception providing for federal jurisdiction exists if the taxpayer can establish "a strong prima facie case of retaliation or intentional discrimination." (*Burlington N. R.R. v. Lennen*, 715 F.2d at 498.) This gloss on the language of section 306 has no support in legislative history and,

<sup>8</sup>In contrast assessment ratio discrimination and tax rate discrimination are results of classification systems which are embedded in state law and therefore must rise to unconstitutional levels before they can be overturned by the state courts.

as the United States has observed, it "would greatly complicate litigation and would have the ironic effect of demanding intrusive judicial probing of state decisionmaking." (First) Brief for the United States as Amicus Curiae in Support of Petitioner, at 11.

Furthermore, the exception is not necessary because, if the taxpayer is able to establish the necessary "strong prima facie case," that evidence should also be sufficient to persuade a state court that a violation of state law had occurred. As noted above, Congress did not find that the state courts were unwilling to protect the railroads' rights under state law.<sup>9</sup>

Nor should this court adopt the distinction suggested by *amicus* the United States between cases involving "systematic overvaluations" which according to the United States would have a federal forum and other cases involving mere "errors" which would be left to the state courts. *Amicus* United States does not define the differences between the two concepts, and the problem with the argument is that, while perhaps theoretically appealing from the perspective of a law library, it fails to make any sense in the context of the real world of property valuation.

The point is illustrated by considering a hypothetical case of the appraisal of a railroad by the cost method. After the tax

<sup>9</sup> Compare the legislative history of section 306 with the legislative history of the Civil Rights Act, 42 U.S.C. § 1983, as described in *Monroe v. Pape*, 365 U.S. 167 (1961), showing Congress' belief that the enforcement by the state courts of federal civil rights was selective and discriminatory.

Nor do the federal courts have an implied equitable power to grant relief in such cases in view of the broad scope of the tax anti-injunction statute, 28 U.S.C. section 1341, which has been understood as depriving the federal courts of jurisdiction to enjoin the collection of a state tax even when the tax is alleged to be unconstitutional. See *Mandel v. Hutchinson*, 494 F.2d 364 (9th Cir. 1974). See also *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), holding that the anti-injunction statute applies to claims of intentional tax discrimination; and *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981), holding that the anti-injunction statute recognizes the need of the states to conduct their own affairs.

agency makes an appraisal based on the estimate that railroad cars have a useful life of thirty years, the railroad files a complaint for declaratory relief in the district court alleging that the useful life is only twenty years. According to *Amicus United States* the threshold question for jurisdictional purposes is whether the railroad has alleged a systematic overvaluation.

But how can the question be answered? On the one hand, if the State's estimate is wrong its use will clearly lead to the systematic overappraisal of every railroad to which it is applied. On the other hand, since any estimate of depreciation is based on factual assumptions about the nature of the equipment and the like, to the extent the assumptions are incorrect they could be defined as errors.<sup>10</sup>

This court should reject the tests of both the Tenth Circuit and the United States. However, if this Court decides that a limited federal overview of state appraisals is warranted, the Tenth Circuit's test at least has the advantage of being more easily understood and applied; furthermore, it focuses on the alleged bias in state tax officials which the railroads claim is the root of their problems. The United States' test lacks any of these advantages and, if it were adopted, we suspect that whether a given case received a hearing in the federal courts would turn on the skill of the attorney who drafted the complaint as much as on anything else.

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<sup>10</sup> Presumably the United States means by the term "error" something more than a simple computational mistake such as the faulty addition of a column of numbers. Not one of the plaintiffs in the approximately twenty law suits filed under section 306 against the California State Board of Equalization has claimed that the appraisal in question was the result of an error of that nature. If the United States does use the word with that meaning, then it apparently is asking this Court to reserve to the state courts jurisdiction over a type of lawsuit which does not exist.

## V

## THE UNTOWARD CONSEQUENCES OF A BROAD INTERPRETATION OF SECTION 306

A reversal of the decision below will mean that for the first time in our nation's history the federal courts will be asked to decide such matters as how to derive a capitalization rate from a railroad's stock and debt holdings, whether deferred income taxes should be treated as income and the pros and cons of the replacement cost new approach.

Furthermore, due to the operation of the collateral estoppel and res judicata doctrines, the decisions the federal courts reach on such matters with respect to any one taxpayer with respect to any one year might be argued to be binding for all other similarly situated taxpayers for all other years. The federal courts therefore might well become the final arbiters of the appraisal of railroad property for purposes of state taxation, even though it is absolutely certain that Congress never intended such a result.

Finally, this Court should be aware that the significance of this case extends beyond the railroad industry. Both the airline industry and the interstate bus industry are subject to legislation similar to section 306 (49 U.S.C. §§ 1513(d) and 11503a), and we understand that the interstate utilities are currently lobbying for the enactment of a comparable bill. If this Court decides that the railroads may use the federal courts as a forum for their appraisal disputes, the decision may be viewed as a precedent for those other industries as well.

**CONCLUSION**

This Court should follow the intent of Congress by holding that section 306 does not encompass claims of valuation discrimination. Such a holding would leave the railroads free, as Congress intended, to present their appraisal disputes to the state courts, where their remedies are more than adequate.

Respectfully submitted,

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## **APPENDIX**

### **Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976)**

(1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision(a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be

necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

(3) As used in this section, the term—

(a) "assessment" means valuation for purposes of a property tax levied by any taxing district;

(b) "assessment jurisdiction" means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

(c) "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

(d) "transportation property" means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.

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Supreme Court, U.S.  
FILED

JAN 28 1987

JOSEPH F. SPANIEL, JR.  
CLERK

No. 86-337

**In the Supreme Court of the United States**  
**OCTOBER TERM, 1986**

**BURLINGTON NORTHERN RAILROAD COMPANY,**  
*Petitioner,*  
vs.  
**OKLAHOMA TAX COMMISSION, et al.,**  
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

**BRIEF FOR THE STATES OF KANSAS, ARIZONA,  
GEORGIA, IDAHO, NEW MEXICO, MISSOURI, AND  
UTAH AS AMICI CURIAE IN SUPPORT  
OF RESPONDENTS**

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### **QUESTION PRESENTED**

Does 49 U.S.C. Section 11503 confer subject matter jurisdiction on a district court of the United States to hear allegations of *mere* overvaluation by owners of rail transportation property and to order state tax officials to use the Court's estimate of value of such property for state ad valorem tax purposes?

#### IV

<i>Pleasant v. Missouri-Kansas-Texas Railroad</i> , 66 F.2d 842 (10th Cir. 1933), cert. denied, 291 U.S. 659 (1934)	19
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<i>Wayman v. Southard</i> , 23 U.S. (10 Wheat.) 1 (1825)	19
<i>Western Union Tele. Co., v. Myatt</i> , 98 F. 335 (1899)	19
<i>Wilson v. Shaw</i> , 204 U.S. 24 (1906)	26
<i>United States v. Brandenburg</i> , 144 F.2d 656 (3rd Cir. 1944)	4

#### Statutes and Regulations:

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#### Legislative Materials

##### Bills:

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#### V

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## INTEREST OF THE AMICUS CURIAE

The State of Kansas, by and through its duly elected and appointed Attorney General, Robert T. Stephan, respectfully submits this brief on behalf of the Oklahoma Tax Commission. Supreme Court Rule 36.4 permits the State of Kansas to file this brief without obtaining the consent of the parties. The following states join Kansas in this brief: Arizona, Georgia, Idaho, New Mexico, Missouri, and Utah.

The Burlington Northern Railroad (hereinafter "BN") seeks an order reversing the jurisdictional threshold requirement of "purposeful overvaluation with discriminatory intent" enunciated in *Burlington N. R.R. v. Lennen*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984) (hereinafter "Lennen"), and applied in the present case. The BN claims that 49 U.S.C. Section 11503<sup>1</sup> vests the federal judiciary with jurisdiction to hear complaints of mere overvaluation of rail transportation property for ad valorem tax purposes and to value that property anew. Since *Lennen* involved Kansas and its ad valorem tax system, the interests of Kansas and the states joining in this brief are in maintaining the rights of the states in exercising their powers of taxation, and in preserving the integrity of states' legislatively developed systems of taxation.

Ad valorem taxes are the primary means of financing local units of government, be they counties, municipalities or school districts. Each state has legislatively devised a system of taxation for financing its public works at all levels; these systems or schemes of taxation guarantee that all similarly situated taxpayers are treated equally. The BN seeks a rule which will permit the federal judiciary to change the foundation upon which these systems of taxation are built.

1. 49 U.S.C. Section 11503 was originally enacted as Section 306 of Public L. No. 94-210, 90 Stat. 54 (1976); it was codified in 1978 as part of the revised Interstate Commerce Act at 49 U.S.C. Section 11503. In this brief, the provision will be referred to as Section 306.

The starting point for ad valorem taxation in the sister states is the valuation of all properties at fair market/true market value. The BN seeks a decisional rule which would permit a United States District Court, on mere allegations of overvaluation by a railroad, to second-guess the valuations set by the state taxing authority and substitute its estimate of value for that of the state tax administrator. Such an intrusion by the federal judiciary into matters of state ad valorem tax administration will wreak havoc in local units of government by withholding essential funds and will effectively establish dual standards of true market value—one applicable to local taxpayers and other interstate industries and the other applicable to selected carriers in interstate commerce.<sup>2</sup>

### SUMMARY OF ARGUMENT

For fifteen years, Congress studied various proposals drafted by the Association of American Railroads to end alleged discriminatory taxation of interstate railroads. From the first proposal in the 1961 Doyle Report, the interstate railroads presented the members of Congress with proposed legislation, statistics, and expert testimony which supported their allegations that the railroads, when compared to other commercial and industrial taxpayers, were being taxed at higher rates.<sup>3</sup> As recounted to Congress, the railroads maintained that discrimination occurred in two ways: 1) the state, either by constitution, statute,

2. Throughout this nation, railroads and other public utilities are typically valued for ad valorem tax purposes by determining the system (or unit) value of the property, and allocating a portion of that system to each state in which it is situated. The BN's rule would permit the federal district courts to vary the valuation methodology used for railroads from the methodology used for all other public utilities.

3. The Doyle Report was concerned with the competitive relationship between different forms of transportation. Since many carriers' rights-of-way are maintained at the public's expense (i.e., highways), the Doyle Report recommended that the rights-of-way of railroads and pipelines be exempted from taxation. The Association of American Railroads, in the alternative, proposed a prototype Section 306. S. Rep. No. 445, 87th Cong., 1st Sess. (1961).

or administrative policy, classified railroads and other public utilities and applied a higher assessment ratio to their property than that applied to other commercial and industrial properties; or 2) the local county officials failed to annually value the properties within their assessment jurisdictions while the state officials, charged with the valuation of railroads and other public utilities, faithfully performed their duties. In the latter instance, the failure of the local units of government to reappraise in times of high inflation caused the effective rate of assessment of locally assessed property to be much lower than the effective rate of assessment of public utilities and railroads which were professionally appraised annually. Over and over the Association of American Railroads regaled Congress with its woes of unequal levels of assessment and the lack of equalization of rail transportation property with the property selected for comparison—other commercial and industrial property. A careful reading of the several thousand pages of legislative history of Section 306 conclusively demonstrates that the railroads, as proponents, never sought valuation relief.<sup>4</sup> Each time an opponent questioned the meaning of certain phrases or criticized the vague, overly broad language in the proposed bills, the railroads repeatedly assured Congress that valuation was not a problem and advised that the proposed legislation would not affect the internal workings of the various state tax administrators in determining valuations of rail transportation properties.

Since Congress was concerned with the right of each state to craft its own system of taxation, Congress sought the railroads' opinions on controversial issues. When various state tax administrators expressed great concern that the language of Section 306 might be construed to allow the federal courts to become involved in the valuation of railroad property, the railroads allayed these fears

4. The Bills, Hearings and Reports reviewed by the Lennen Court are set forth in Appendix A.



by responding that valuation was not an issue, by interpreting the suspect language as excluding overvaluation as a proscribed act, and by drafting a definition for true market value. Congress thereafter adopted the railroads' definition as its own. S. Rep. No. 1483, 90th Cong., 2d Sess. (1968).

In this case, the fears and concerns of the various states have been realized and have risen like a phoenix from the ashes; the BN has reversed its prior position and has reneged on the promises and assurances given to Congress. The BN now claims that the plain language of the statute does confer subject matter jurisdiction on the federal district courts to hear complaints of overvaluation. Since the legislative history is not supportive of its argument, the BN brushes it aside as irrelevant, or quotes passages from the legislative record out of context.

No careful examination of the legislative history supports the BN's assertion that Congress intended to vest the federal district courts with the power to value the nation's railroads for ad valorem tax purposes. Assuming, *arguendo*, that the BN prevails on its "plain language" argument, this Court must then resolve the more difficult issue of whether the congressional grant of jurisdiction to the federal courts to value property for state ad valorem tax purposes runs afoul of other provisions of the Constitution.

While the power of Congress under the Commerce Clause is plenary, it is not without restrictions; this power is subject to and coexistent with other constitutional limitations. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). When the construction of Section 306 urged by the railroads is examined, the constitutional infirmity of such an interpretation becomes evident. Application of principles of construction followed by this Court requires that Section 306 be construed in a manner which eliminates any doubt regarding its constitutionality. *United States v. Brandenburg*, 144 F.2d 656, 661 (3rd Cir. 1944). The legislative

history of Section 306 and the application of the general principles of statutory construction clearly demonstrate that Congress did not intend to provide federal jurisdiction to hear the railroads' complaints of improper valuation methodology.

Assuming, *arguendo*, that the BN convinces this Court that Section 306 should be broadly construed because Congress intended to provide great relief for the railroads, the *Lennen* threshold requirement of purposeful overvaluation must stand, because there is no evidence that Congress intended to change the burden of proof traditionally required by courts of equity hearing valuation complaints.

## ARGUMENT

### I. Congress, In Enacting Section 306, Did Not Intend For Federal Courts To Become Involved In The Valuation Of Railroads

The BN asserts that an examination of the legislative history of Section 306 is unnecessary because the statutory language is clear. (Pet. Br. at 22) Despite that claim, the BN devotes approximately one-half of its argument to a distorted analysis of the legislative history in a vain attempt to convince this Court that the exhaustive review of the fifteen year legislative history of Section 306 undertaken in *Lennen* was incorrect. The BN argues that the statements, interpretations and opinions offered to Congress by the attorneys-lobbyists of the Association of American Railroads are not relevant in construing the statutory language because these statements were merely opinions of individuals from the private sector.<sup>5</sup>

5. James Ogden and Philip Lanier, in addition to making multiple appearances before Congress, acted as legal counsel for the Association of American Railroads by drafting legal memoranda on the meaning of various provisions in the proposed bills. It is important to note that Congress, on numerous occasions, adopted Messrs. Ogden and Lanier's views and opinions as its own.



(Pet. Br. at 25) The BN's position fulfills the prophecy of the various critics of Section 306 who faulted the vague language of the railroad-drafted legislation and predicted that the railroads might raise valuation as an issue.

Since the Association of American Railroads drafted the prototype of Section 306, the statements of that organization's representatives are particularly enlightening as to the meaning of certain phrases and the extent of relief sought. Congress adopted many of the Association's statements in its Reports; since these statements and assurances are admissions against its interest, the BN wishes to obscure these inconsistencies. Each time a responsible state official expressed concern that the proposed legislation might be construed to affect the state's valuations of rail transportation property, the railroads repeatedly advised Congress that valuation was not the problem for which they sought redress. Each time the valuation question arose, Congress adopted the explanations and assurances offered by the railroads and rejected the warnings of state tax officials.<sup>6</sup>

In 1964, James N. Ogden, Vice President and General Counsel of the Gulf, Mobile and Ohio Railroad Company, representing the Association of American Railroads, emphatically stated that the problem which confronted the railroads was *discriminatory equalization*, not valuation:

*The principal problem in the matter of railroad assessments is not one of how to value a railroad. In the hundred-year history of railroad taxation, the practice of valuing railroads for tax purposes has reached a substantial degree of refinement. Though not as simple as valuing a one-family dwelling, the method*

6. Under the BN's version of the legislative history, Congress, after hearing the concerns of the various states, deliberately adopted legislation which established such fears and concerns as law. The legislative history is devoid of any evidence that Congress intended to penalize the states in such a fashion.

is neither incomprehensible nor even overly complicated. And it should be remembered that no greater effort is required to assess a railroad fairly and reasonably than is required to assess one unfairly and unreasonably. *The real problem is to determine how much of the valuation that has been found should be assessed, which, in turn, depends upon how much of the valuation of other property is assessed. In other words, the problem is how to get the tax assessors in the several States to equalize the railroad's assessment with that of other property in the same taxing district.*

True equalization requires that each parcel of property be assessed at a figure which is the same proportion of its full value as the assessment of every other parcel of property in the same taxing district is of its full value.

Railroad assessments are not equalized fairly and reasonably in numerous instances. Many tax assessors simply cannot or will not equalize railroad assessments with the assessments of other property even though both kinds of property are subject to the same tax levy. *Hearings on H.R. 736 and H.R. 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess., at 18-19 (1964) (emphasis added).*

The nation's railroads, speaking through Mr. Ogden, told Congress that because a substantial degree of refinement existed in the valuation procedure for railroads, *equalization* of assessment ratios and tax rates was the issue for which they sought relief. In 1967, Mr. Ogden, again, testified before Congress; this time, he addressed the valuation issue by noting that the phrase "true market value" had a well-defined meaning in the area of state ad valorem taxation. *Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, 90th Cong., 1st Sess., at 22 (1967).* To explain the term "true market value" used in the proposed bill, Mr. Ogden supplied the following definition:

"True market value" is the goal generally sought by all tax assessors either as the assessment figure or as a starting point from which final assessments of less than "true market value" may be computed. In an authoritative treatise published by the National Association of Tax Administrators, the following statement appears:

"The statutes of the several States prescribing the value standard for tax purposes use such terms as 'fair market value,' 'fair cash value,' 'full market value,' and the like. All of these terms are synonymous: they mean nothing more and nothing less than what we mean in this report by the term 'market value' or the word 'value' without a qualifying adjective."

These have been judicially defined in numerous cases. For instance, I call your attention to *New York Bay R. Co. v. Kelly*, 22 N.J. Misc. 204, 37 A. 2d 624, 628 (1944); *Fort Worth & D.N. Ry. Co. v. Sugg* (Tex. Civ. App.), 68 S.W. 2d 570, 572 (1934); and *Guyandotte Valley R. Co. v. Buskirk*, 57 W. Va. 417, 50 S.E. 521, 526 (1905).

Of course, the proportion of "true market value" at which assessments are finally fixed varies among the several States. In some States the law requires assessment at "true market value," in others at 60 percent thereof, in others at 35 percent, et cetera.

Railroad property in most of the States is valued and assessed as a unit; that is, the whole system as it exists in 8, 10, or 15 States is valued; this value is distributed among the several States on the basis of recognized allocation factors; and then, in turn, the value in a particular State is apportioned among the several taxing districts in that State on the basis of mileage. In other words, when railroads are assessed as a unit the total value is first determined and then apportioned: the total assessment is not determined by adding the assessed value of individual items that make up the railroad plant.

As to the few States in which railroad property is locally assessed, I have no specific information con-

cerning the assessment methods but I suppose it would be natural for the assessors to compare adjoining properties.

Let me emphasize that S. 927 does not suggest or require a State to change its assessment standards, assessment practices, or the assessments themselves. It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other. It is not a standard for determining value; it is a standard to which values that have already been determined must be compared. This standard is "true market value" (also the generally accepted standard for assessment purposes) and the requirement is that carrier property be assessed at the same proportion of such value as the proportion at which all other property subject to the same tax rates is assessed. *Id.*, at 29 (emphasis added).

Although the BN attempts to minimize the importance of Mr. Ogden's testimony by referring to him as merely an individual from the private sector, Congress accorded Mr. Ogden's explanation of "true market value" much greater weight; his definitional statement was subsequently adopted by the Senate Committee on Commerce in its entirety as "Appendix B" in its 1968 *Report on Discriminatory State Taxation of Interstate Carriers*:

In order to avoid any question as to the meaning of the phrase "true market value" as used in S. 927, the committee accepts the definition of this phrase as set forth in appendix B attached to this report. *The committee intends by the phrase "true market value" the meaning set forth in appendix B. S. Rep. No. 1483, 90th Cong., 2d Sess., at 10 (1968) (emphasis added).*

After Congress defined "true market value" in its 1968 Report, that phrase remained unchanged in all subsequent Section 306-type bills. Congress clearly expressed its intention when it stated that "true market value" is not a standard for determining value and recognized



that the several states used various terms for "true market value". By adopting the Association of American Railroads' statement, Congress intended that "true market value" used in Section 306 would not be a standard for determining value and clearly stated that the true market value was a standard for comparison of assessments. Like Congress, the railroads, from 1967 until passage of Section 306 in 1976, were steadfast in their opinion that Section 306 did not provide a means for redetermining value.

During the July 30, 1969, *Hearings on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess., the question of whether the federal courts would be empowered to redetermine the valuation of the railroads' property by substituting the court's valuation for that of the state once again arose. This time, Philip M. Lanier, on behalf of the Association of American Railroads, responded to a question from Senator Hansen on how railroads were valued in his home state of Wyoming:

SENATOR HANSEN: Is this same formula—this same three-factor formula in use for the purpose of this study throughout the country, or is this only the way it is done in Wyoming?

MR. LANIER: The formula varies from State to State and we are not dealing with the valuation question. This is not our problem. We speak only of the equalization of the tax rate. *Id.*, at 39.

The Senate Committee on Commerce in its *Report on Discriminatory State Taxation of Interstate Carriers* reiterated the view set forth in its earlier report—that S. 2289, like S. 927, was not intended as a standard for determining value. See S. Rep. No. 91-630, 91st Cong., 1st Sess., at 10 and 25-26 (1969).

In the 1970 *Hearings on H.R. 16245 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess., the issue of valuation was put to its annual

"final" rest; once again, Philip M. Lanier explained that the bill did not give the federal courts the right to redetermine valuation. Lanier reiterated that the bill only required that the values, both assessed and true market set by the taxing officials (both local and state), be compared:

MR. LANIER: On the valuation—this bill would not deal with valuation being standard. *The standards and methods of valuation that any State wishes to use would be totally unaffected by this legislation.*

The short answer, if I may give it this way, and I think it will be clear, is that for valuation purposes different kinds of property put to different uses do require different methods of valuation. And the method of valuation applied to a railroad is quite different from that which is applied to a residence, a farm, factory, whatever it may be.

And that is appropriate because it is the way to get at the real value. *There is nothing in this legislation—and we have no brief here to alter that—it is only in the area of equalization of the computed value that this legislation speaks. That is where our problem is.*

MR. ADAMS: On page 2 of the bill it says, "The assessment"—which is what the tax collector comes in on—"for the purposes of a property tax"—and that is all I am talking about here now—"owned or used by a common carrier at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all other such property."

*That appears to me that you are taking into account both valuation and assessment.*

MR. LANIER: I think I can answer it this way.

*Without regard to this legislation, assuming it is enacted, without regard to it the assessing authority for the railroads put a value—a fair market value, true market value, the words mean the same—on that railroad property and the local assessor in the towns*



*you refer to puts a true market value on the residences. After that is done, this bill would come into play. Id., at 138-39 (1970) (emphasis added).*

The question of whether overvaluation was an issue with which Congress was concerned in enacting Section 306 was finally laid to rest in the *Report on S. 2718 of the Comm. of Conference*, Rep. No. 94-595, 94th Cong., 2d Sess. (1976). The Conference Committee met to resolve the differences between the House and Senate versions of what is now Section 306. The Conference Committee Report indicates that the House amended S. 2718 to include overvaluation among the prohibited tax practices and further provided methods by which true market value could be established. *Id.*, at 166. The Senate version of the bill did not include "overvaluation" as one of the prohibited acts and therefore did not outline any methods by which true market value could be established. *Id.*, at 165. When the Conference Committee reconciled the differences in the two versions by adopting a substitute bill which followed the Senate version, overvaluation as a proscribed act under Section 306 was deleted. *Id.*, at 166. Congress, in 1976, refused to adopt a bill which included overvaluation as a proscribed act under Section 306; the BN is asking this Court to grant that which Congress denied. This Court cannot rewrite this legislation to give the railroads that which Congress specifically withheld.

In every major hearing on the predecessors to Section 306, the railroads were asked whether the proposed legislation would allow a federal judge to redetermine the value of a railroad. On each occasion, the Association of American Railroads, through their attorneys-lobbyists, replied in the negative. Congress took the railroads' assurances at face value and adopted the railroads' statement that the statute "is not a standard for determining value" in its Reports.<sup>7</sup> Unlike other portions of the Section 306, the term

7. See, S. Rep. No. 1483, 90th Cong., 2d Sess. (1968); S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969).

"true market value" never changed throughout the fifteen years of congressional consideration. The legislative history reveals clearly that neither Congress nor the railroads intended to turn the federal judiciary into property appraisers.<sup>8</sup>

Had Congress intended to pre-empt the rights of states in valuation matters and establish a precise federal standard for determining true market value, it would have included "true market value" in its definition section, would have specified overvaluation as a proscribed act, and would have prescribed a valuation methodology to be used by the courts. The absence of such definition, directive, and methodology in Section 306 reflects Congress' intention to respect the true market value determinations of state tax administrators. Neither the legislative history nor the language of Section 306 evidences an intent by Congress that valuation should be redetermined by courts hearing Section 306 actions. This Court cannot second-guess the wisdom of Congress to give to the railroads that which Congress withheld.

## II. The Statutory Construction Urged By The BN Would Render Section 306 Unconstitutional

The BN urges this Court to broadly construe the provisions of Section 306. The BN's brief is silent as to whether its proposed statutory construction withstands constitutional challenge. Congress was advised of and well knew the limitations of its power. For this reason, Con-

8. While Congress was repeatedly advised that state officials were valuing Railroad property at true market value, the railroads paraded witness after witness before Congress to testify that locally assessed real estate and personal property were valued infrequently or undervalued. Typical of such testimony was that of Rolf Weil who told Congress that while local assessors often undervalued or failed to revalue in times of high inflation, the states' highly qualified staff annually valued the railroads' property at full value. Dr. Weil advocated the use of ratio studies to determine the true market value of the locally appraised property. *Hearings on S. 927 before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 90th Cong., 1st Sess., at 68-9 (1967).

gress repeatedly directed that the statute should be construed by the courts to avoid any constitutional infirmity. See, *S. Rep. No. 1483*, 90th Cong., 2d Sess., at 12 (1968).

The relief requested in the instant appeal is that the trial court should decide whether the BN's rail transportation property has been valued by the State of Oklahoma in excess of its "true market value." The first step in reaching such a determination necessarily requires that the federal district court revalue the property in order to determine the BN's "true market value." To decide whether the interpretation urged by the BN is constitutional, this Court must decide the following issues:

- (1) Whether federal courts possess the inherent power to value railroad property for state ad valorem tax purposes absent specific statutory authority;<sup>9</sup> and
- (2) Whether Congress could legislatively grant jurisdiction to federal courts to perform the nonjudicial function of valuation for state ad valorem tax purposes.

Application of constitutional principles requires both of these questions be answered in the negative.

#### **A. Federal Courts Do Not Possess The Inherent Power To Value Property For State Ad Valorem Purposes**

The BN, in asserting that the *Lennen* decision will thwart the purposes of Section 306, has implicitly argued that, but for the jurisdictional bar of the Tax Injunction Act, 28 U.S.C. Section 1341 (hereinafter "Section 1341"), federal courts inherently possess the power to value property for state ad valorem tax purposes. The BN rea-

9. While space does not permit a detailed discussion of the ability and resources of a court to hear valuation cases, it should be noted that in *Burlington N. R.R. v. Bair*, 584 F. Supp. 1229 (S.D. Ia. 1984), *aff'd in part; rev'd in part*, 766 F.2d 1222 (8th Cir. 1985), the court admitted that this type of litigation is complex. The Kansas 4-R litigation demonstrates the burden placed upon the federal courts. It took four years to resolve the various issues; during this period, the railroads in Kansas obtained injunctive relief and withheld \$24,000,000.00 from Kansas counties. At the conclusion of the litigation, these monies were finally restored to the counties.

sons that since Section 306 lifts the Section 1341 jurisdictional bar, the federal courts have the power to revalue, even though Section 306 does not contain a specific grant of such power. No pre-Section 1341 cases have been cited which support such an assertion. The absence of authority is due to the fact that the pre-Section 1341 case law favors the Oklahoma Tax Commission.

As early as 1874, this Court declined an invitation to involve itself in the valuation of property for state ad valorem tax purposes. *Heine v. Board of Levee Commissioners*, 86 U.S. (19 Wall.) 655 (1874). In *Heine*, certain bond holders brought an action seeking an order of the district court requiring the commissioners to value and collect taxes on the property within their district and pay the interest and principal due on the bonds. In the alternative, the plaintiffs asked that the court perform such acts. Justice Miller, speaking for this Court, declared that the relief requested would constitute a federal usurpation of the state's legislative power:

The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. In the case before us, the national sovereignty has nothing to do with it. The power must be derived from the Legislature of the State. So far as the present case is concerned, the State has delegated the power to the Levee Commissioners. If that body has ceased to exist, the remedy is in the Legislature either to assess the tax by special statute or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal Court. It is unreasonable to suppose that the Legislature would ever select a Federal Court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal Government of the legislative functions of the state government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which



no wisdom can foresee. 86 U.S. (19 Wall.) at 660-61 (emphasis added).

Under our system of government, the power of taxation belongs to the legislative branch of government. The legislative branch may exercise its power of taxation by establishing administrative officers who are charged with the responsibility of administering the tax imposed. The separation of powers doctrine prohibits the judiciary from interfering with or substituting its judgment for that of these administrative officers.

The BN seeks, under the guise of Section 306, to retry an issue settled more than a century ago. In *Taylor v. Secor*, "State Railroad Tax Cases," 92 U.S. 575 (1876), the railroads brought suit in federal court alleging that an Illinois statute prescribing a valuation methodology for railroads produced excessive valuations and requested the excessive valuation be enjoined. This Court refused to grant the relief requested, citing a lack of constitutional authority:

One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is, that it *has no power* to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the State. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the Constitutions of all the States, and by the theory of our English origin, is exclusively legislative. *Heine v. Levee Comrs.*, 19 Wall. 660, 22 L. ed. 226. *Id.*, at 614-15 (emphasis added).

Following the century-old rationale of this Court in the above decisions, lower federal courts have acknowledged that the doctrine of separation of powers severely restricts their ability to interfere with matters of state assessment and taxation. In *Helmsley v. City of Detroit, Michigan*, 320 F.2d 476 (6th Cir. 1963), the Sixth Circuit affirmed the district court's dismissal of a complaint seek-

ing a declaratory judgment that the assessment and ad valorem taxes on certain real estate violated the due process and equal protection clauses of the Fourteenth Amendment. In so holding, the Sixth Circuit stated quite emphatically:

Taxation is a legislative function and not a judicial function. It is proper therefore that courts should not substitute their judgment for that of the taxing authorities and should not interfere with them except in cases of constructive fraud.

We do not think it is the function of any trial court, having jurisdiction to hear plaintiff's complaint, to specifically fix the amount of the assessment on his property. *Id.*, at 480-81.

#### **B. Congress Lacks The Power To Grant Jurisdiction To The Federal Courts To Perform The Nonjudicial Function Of Valuation**

Congress was aware that if Section 306 was broadly interpreted, the statute could be rendered unconstitutional as an unauthorized delegation of legislative power. The Attorney General of the United States repeatedly cautioned Congress regarding the potential constitutional infirmities by quoting *Moses Lake Homes, Inc. v. Grant Co.*, 365 U.S. 744 (1961): "Federal courts may not assess or levy taxes".<sup>10</sup> Two Vanderbilt law professors, Paul J. Hartman and Paul H. Sanders, retained by the Association of American Railroads, echoed the opinion of the Attorney General on the prohibition set forth in *Moses Lake*. Professors Hartman and Sanders opined that *Moses Lake* was "good law" and assured Congress that the proposed statute would be interpreted by the courts to avoid any constitutional infirmity:

10. See, *Hearings on H.R. 4972 Before The House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess., at 3-4 (1966) and Rep. No. 1483, 90th Cong., 2d Sess., at 16 (1968), for examples of the Attorney General's letters.



The proposed statute does not require or direct that the Federal judge perform the tax assessment or tax levying function. *Moses Lake* is eminently correct, of course, in saying that federal courts do not assess or levy state taxes as such.

The proposed statute provides injunctive relief against discrimination and unquestionably such a remedy should be "fashioned in the light of well-known principles of equity."

In the last place, the *Moses Lake* decision does not indicate any constitutional infirmity in the provisions for remedy in the proposed statute because it is obvious that this statute can and should be construed so as to avoid any charge that a nonjudicial function is required to be performed.

Hearings on H.R. 4972 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong., 2d Sess., at 53 (1966) (emphasis added).

After hearing the Vanderbilt professors, Congress instructed that Section 306 should be construed to avoid any charge that a nonjudicial function was imposed on the courts. See, S. Rep. No. 1483, 90th Cong., 2d Sess., at 12 (1968).

It is well established that the determination of value for state ad valorem purposes is a non-judicial function belonging to the legislative branch of government.<sup>11</sup> *Heine*.

11. Kansas, like most other states, adheres to the separation of powers doctrine; for this reason, Kansas courts have long observed the principles articulated by this Court in *Heine* and the *State Railroad Tax* cases. An example of the Kansas Supreme Court's reasoning is well illustrated in *Mobil Oil Corporation v. McHenry*, 200 Kan. 211, 436 P. 2d 982 (1968):

It has been held from an early date that matters of assessment and taxation are administrative in character and not judicial. In *Symms v. Graves*, (1902), 65 Kan. 628, 70 Pac. 591, it was said:

"... Matters of assessment and taxation are administrative in their character and not judicial, and an interference by judges who are not elected for that purpose with the discharge of their duties by those officers who are invested with the sole authority to make and

The legislative branch may exercise its power of taxation by establishing administrative agencies and empowering officials to operate the same. The separation of powers doctrine imposes restrictions on the branches of government: the legislative branch is prohibited from delegating its power of taxation to the judiciary, *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), *Western Union Tele. Co. v. Myatt*, 98 F. 335 (1899); the judicial branch is prohibited from interfering with or substituting its judgment for that of state officials legislatively authorized to administer the state system of taxation. *Moses Lake Homes; State Railroad Tax Cases*. The relief sought by the BN would require that the federal court perform a nonjudicial function of valuing the property anew and substituting its notion of true market value for that of the state tax official; this construction does not withstand constitutional analysis.

### III. The 10th Circuit's Threshold Requirement Of Purposeful Overvaluation With Discriminatory Intent Is Supported By Traditional Equitable Principles

When the Tenth Circuit rendered its decision in *Lennen*, it had analyzed the legislative history of Section 306, reviewed the recent state tax decisions of this Court,

*estimate value is unwarranted by the law. The district court could not substitute its judgment for that of the board of equalization, and this court cannot impose its notion of value on either. These are fundamental principles in the law of taxation and cannot be waived aside to meet the exigencies of any particular case. . . . (p. 636)" Id., at 227 (emphasis added).*

Similarly, the Tenth Circuit, in a case tried prior to the enactment of 28 U.S.C. Section 1341, *Pleasant v. Missouri-Kansas-Texas R.R.*, 66 F.2d 842 (10th Cir. 1933), cert. denied, 291 U.S. 659 (1934), recognized the separation of powers doctrine which it observed with deference:

If the assessment is higher than it should be, as the master and the trial court found, it is the result of a mistake which must be corrected, if at all, by the Commission which made it; the courts cannot try anew all the assessments in the state. *Id.*, at 850 (emphasis added).

and examined a long line of equity cases decided prior to the enactment of the Tax Injunction Act. The *Lennen* court did not decide the overvaluation issue in a vacuum; the Kansas 4-R equalization case was pending before that court. Contrary to the assertion of the BN and the Solicitor General, the Tenth Circuit did not invent the threshold requirement of purposeful overvaluation with discriminatory intent, but relied upon well established equitable principles in determining which actions were cognizable under its general equity powers. In order to appreciate the foundation for the Tenth Circuit's rationale, a procedural review of the *Lennen* litigation provides insight.

In 1980, eleven railroads sued the Department of Revenue and then Secretary of Revenue Michael Lennen, alleging that Kansas had violated Section 306 by assessing rail transportation property at a higher ratio of true market value than other commercial and industrial property was assessed. The eleven railroads admitted that Kansas had valued their rail transportation property at its true market value; their complaint was that, due to infrequent reappraisal by the county assessors during a period of high inflation, locally assessed real estate was valued at less than its true market value. The railroads sought an injunction prohibiting Kansas from applying a higher rate of assessment to their true market value than the rate of assessment applied to the true market value of locally assessed property as demonstrated by a sales-assessment ratio study.<sup>12</sup> Following a three and one-half week trial in 1982, the District Court enjoined the State from collecting 60% of the taxes levied. *Atchison, T. &*

12. The Railroads, in order to convince the district court that their property should be equalized with locally assessed real estate only, argued that an examination of the legislative history was essential and would establish that Congress intended, by its reference to ratio studies, to make the comparison property for equalization commercial and industrial real estate only, even though the statutory definition in Section 306 stated otherwise.

*S.F. Ry. v. Lennen*, 552 F. Supp. 1031 (D. Kan. 1982) (hereinafter "equalization case"). The State and County Defendants appealed to the Tenth Circuit.

Within six months of the decision in the 1980 equalization case, the railroads commenced their action for the 1982 tax year. In the 1982 case, six of the eleven railroads alleged, for the first time, that Kansas had valued their rail transportation property at a value which exceeded true market value.<sup>13</sup>

The District Court, in November 1982, heard the valuation claim of the six railroads (hereinafter "BN Railroads"). The BN Railroads relied upon a consultant for their estimates of value; the State, after objecting to the court's jurisdiction, called the Director of Property Valuation and two appraisers with the Public Service Bureau of the Department of Revenue.

Both sides agreed that the proper method for valuing a railroad was to determine its system or unit value and then allocate a portion of that system value to each state in which it had property; both parties utilized the same general methodology to arrive at their estimates of value. The BN Railroads' consultant quibbled with some of the factors used by Kansas in doing its calculations but acknowledged that, as he had testified in the 1980 equalization case, Kansas followed a particularly consistent approach to value. He also admitted that he had opined in the 1980 case that the values used in Kansas were reasonable.

After hearing detailed testimony regarding the Kansas valuation methodology, the District Court denied the re-

13. The six Railroads challenging the State's determination of value were the Burlington Northern Railroad, the Missouri Pacific Railroad, the Kansas City Southern Railway, the Kansas and Missouri Railway and Terminal Company, the Union Pacific Railroad and the Missouri-Kansas-Texas Railroad. Five railroads admitted that the values determined by the State were their true market values: The Atchison, Topeka and Santa Fe Railway, Chicago and Northwestern Transportation Company, Chicago, Rock Island and Pacific Railroad, Kansas City Terminal Railway and the St. Louis Southwestern Railway.



quest for a preliminary injunction, finding that the BN Railroads had failed to demonstrate reasonable cause to believe that Kansas had overvalued their property in 1982.<sup>14</sup> The District Court also held that Congress, in enacting Section 306, did not generally intend for federal courts to become involved in the valuation process. *Burlington N. R.R. v. Lennen*, 573 F. Supp. 1155 (D. Kan. 1982). The BN Railroads appealed to the Tenth Circuit Court of Appeals from the order denying the preliminary injunction.

When the Tenth Circuit heard the valuation appeal on May 19, 1983, it had, in addition to the Record below, the briefs on the 1980 equalization case as well as the Joint Legislative History Appendix as references.<sup>15</sup> The same panel heard both the Kansas valuation and equalization appeals before issuing its decisions; that panel understood all of the inconsistencies in the Railroads' arguments on "plain language" and the differences between valuation and equalization relief.<sup>16</sup> Unlike the Eighth Cir-

14. The court heard testimony that all railroads in 1982 were valued in exactly the same manner. The court also was advised that from 1971 to 1982, no actions were commenced before the Kansas Board of Tax Appeals or a Kansas Court by railroads seeking valuation relief; other public utilities, valued by the same methodology during the same period, had appealed their determinations of value to both the Board of Tax Appeals and the courts and had received relief. See, Statement of Barry N. Roth, Vice President, The Williams Company, in opposition to H.R. 2092, a Tax Discrimination Bill for Natural Gas Pipelines. Hearing on H.R. 2092 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 99th Cong., 1st Sess. (1985). The Tax Discrimination Bill for Natural Gas Pipelines was not enacted when considered by the 99th Congress.

15. In order to assist the Tenth Circuit, the State and County Defendants jointly filed a two volume Appendix which contained complete copies of all of the bills, hearings and reports on Section 306. The Joint Appendix contained several thousand pages and weighed approximately five pounds.

16. Petitioner and the Solicitor General express confusion about the differences between actions seeking relief from overvaluation and equalization. (Pet. Br. at p. 11 f.n. 18; U.S. Br. at 5) Had Petitioner, like the 10th Circuit, read the legislative history of Section 306, it would not be puzzled because equalization relief was defined and discussed in detail.

cuit in *Burlington N. R.R. v. Bair*, 766 F.2d 1222 (8th Cir. 1985), and the Ninth Circuit in *Atchison, T. & S.F. Ry. v. Board of Equalization*, 795 F.2d 1442 (9th Cir. 1986), the Tenth Circuit in *Lennen* had a unique opportunity to examine in detail the differences between valuation and equalization actions.

In the Kansas equalization case, *Atchison, T. & S.F. Ry. v. Lennen*, 552 F. Supp. 1031 (D. Kan. 1982), the railroads argued that Section 306 was ambiguous and could only be correctly construed by examining the legislative history; the Tenth Circuit was inundated with references to the legislative history to assist in the construction of various phrases in the statute. Both the District Court and the Tenth Circuit found that an analysis of the legislative history was essential to provide guidance as to the correct manner for achieving equalization of assessment ratios. The Tenth Circuit resolved the following equalization issues which were unanswered by the "plain language of the statute":

1. Whether the sales-assessment ratio study was the sole means for proving the true market value of all other commercial and industrial property;
2. Whether the reference to sales-assessment ratio studies reflected Congress' intention to make commercial and industrial real estate the comparison property since personal property sales-assessment ratio studies were not commonly conducted;
3. Whether centrally assessed public utilities were commercial and industrial property for equalization purposes; and
4. Whether commercial and industrial personal property should be included in determining the level of assessment for the comparison property—all other commercial and industrial property. See, *Atchison, T. & S.F. Ry. v. Lennen*, 732 F.2d 1495 (10th Cir. 1984).

The Tenth Circuit's concern with the absence of a legislatively mandated means for determining the true market value for railroads in *Lennen* resulted from the examination required in the equalization case of the volumi-



ous references in the legislative history to the sales-assessment ratio study—the means endorsed by Congress for proving the true market value of other commercial and industrial property. Section 306(2)(e).<sup>17</sup> Congress knew that valuations and appraisals are subjective determinations; the omission of an objective standard for proving the true market value for railroads cannot be considered accidental when an objective standard—the sales-assessment ratio study—was mandated for proving the true market value of commercial and industrial property. The Tenth Circuit, following its in-depth review of the legislative history, correctly concluded that the omission of such an objective means of proof was deliberate, because Congress did not intend for district courts to sit as state tax appraisers for railroad properties.

While the *Lennen* decision rested, in part, upon the repeated assurances of railroad attorneys-lobbyists that valuation was not a problem, the Tenth Circuit was also mindful that Congress in Section 306 attempted to balance the interest of the railroads in property tax equalization with the interest of the states in retaining their rights as sovereign states.<sup>18</sup> The enlargement of the court's ju-

17. The railroads were unconcerned about valuation. In promoting Section 306, the railroads hired numerous experts in the area of tax administration to educate Congress about equalization. The experts wrote memoranda explaining equalization in detail and discussed how to perform a sales-assessment ratio study on locally assessed property in order to determine its true market value. There was no similar presentation by appraisers retained by the railroads; the railroads never discussed the proper manner or methodology for valuing a railroad with Congress.

18. The issue of states rights received major debate during the fifteen years Section 306 was considered by Congress. In 1964, the Advisory Commission on Intergovernmental Relations advised:

While considerations of interstate commerce are important, they occupy a subordinate position to the requirement of this Federal system of government that, subject only to the limitations of the Constitution, the States, as the Federal Government, are free to shape their own and their political sub-divisions' tax systems. *Hearing on H.R. 736 of the Subcomm. on Transportation and Aeronautics of the House*

risdiction under Section 306 sought by the BN Railroads conflicted with the congressional concern for states' rights. The Tenth Circuit's conclusion that "the valuation relief sought by the railroads is not provided by Section 306" is supported by the language of the statute and the legislative history.

However, once the Tenth Circuit announced its decision on statutory construction, it had to address a factual issue peculiar to the *Lennen* litigation—whether the Kansas officials, following the decision in the 1980 equalization case deliberately raised the 1982 valuations of the BN Railroads in order to recoup a portion of the 1980 taxes enjoined. The District Court in *Lennen* was justifiably concerned that the state officials had retaliated against the railroads. After a three day trial, the District Court was satisfied that Kansas had not violated its previously issued injunction and that the railroads' valuations had increased

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*Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess., at 6 (1964).*

Congress was concerned that, under the guise of the Commerce Clause, they were being asked to regulate and restructure the legislatively devised tax structures of the various states. From such concerns came the direction of the various Congressional Committees that the "bill would in no way alter the freedom of a State to tax its taxpayers so long as interstate carriers are accorded equal tax treatment with other taxpayers." S. Rep. No. 1483, at 14 (1968). The concern of Congress with the possible intrusion upon states rights did not end in 1968; states rights was a reoccurring theme throughout the fifteen year history with Congress repeatedly stating in its Reports that the measure granted no favored status to transportation property nor a windfall to carriers. To guarantee that no favored status was afforded, Congress advised:

... the mere grant of jurisdiction to Federal courts to consider issues under this measure does not mean that the Federal courts will enjoin all State taxation of property that the carriers allege to be discriminatory . . . the carrier would have to make the usual showing to obtain injunctive relief. Since the measure in essence grants equity jurisdiction to the courts, it is expected that the courts will balance the adverse impact on the community of any relief granted against the benefits to be derived by the carrier from such relief. The courts are capable of fashioning remedies that are not burdensome to the communities involved. S. Rep. No. 92-1085, 92d Cong., 2d Sess., at 8 (1972).

due to mergers and improved performance reflected in the market and income approaches to value. As a warning against future retaliation, the District Court held jurisdiction would be entertained if the railroads could make a "strong showing that state authorities had deliberately overvalued their property in retaliation for previously obtained equalization relief." The Tenth Circuit, in addressing the same factual issue, acknowledged the narrow equity power found by the District Court but broadened its scope to provide for an action for intentional, purposeful overvaluation whether or not there had been previous litigation between the parties.

The Tenth Circuit knew, from its thorough examination of the legislative history, that Congress intended the measure to grant equity jurisdiction to the courts. *S. Rep. No. 92-1085*, 92d Cong., 2d Sess., at 8 (1972). Congress was emphatic that Section 306 should not be construed to provide relief for all actions which were alleged to be discriminatory:

Enactment of this section will not necessarily mean that the Federal Courts will enjoin all state taxation of rail property which are the subject of complaint. The railroads will still have the usual burden of demonstrating that discrimination exists. They will also have to make the additional showing that they are entitled to injunctive relief. Railroad Revitalization and Regulatory Reform Act of 1975, 94th Cong., 1st Sess., Rep. No. 93-725, at 77-8 (1975).

The Tenth Circuit was aware that, as a matter of general principle, courts of equity must consider the interests of both the plaintiff and the defendant. *Wilson v. Shaw*, 204 U.S. 24 (1906). The *Lennen* court was mindful of this Court's recent decisions in *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981) and *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981) which discussed the interrelationship of the principles of equitable restraint, comity, and Tax Injunction Act, 28 U.S.C. Section 1341. In *McNary*, this Court held that the principle of

comity bars taxpayers from asserting 42 U.S.C. Section 1983 actions challenging the validity of state tax systems in federal courts. In *Rosewell*, this Court recognized that the pre-1937 federal equity treatment of challenges to state taxes followed the long standing rule of federal equity to keep out of state tax matters as long as a "plain, adequate and complete remedy" could be had at law. *Id.*, 450 U.S. at 525.

Cognizant that the most recent determinations of this Court instruct that federal litigation which would intrude upon and disrupt state tax systems should not be allowed absent extraordinary circumstances, the Tenth Circuit reached back to a long line of equity cases decided prior to the enactment of 28 U.S.C. Section 1341. These cases, which held that equity will not interfere absent proof of circumstances indicating actual or constructive fraud on the part of the taxing authorities or something evincing an intention to discriminate against a particular taxpayer, provided the prerequisite for maintaining an action seeking valuation relief under Section 306. In *Rowley v. Chicago & N.W. Ry.*, 293 U.S. 102 (1934), this Court reversed a Tenth Circuit decision in favor of the railroad. In *Rowley*, the railroad alleged that the State had systematically and intentionally discriminated against the railroad by overvaluing its property. In holding that the railroad was not entitled to an injunction, this Court, citing a myriad of cases, reiterated the then well established principle that, absent proof of circumstances indicating fraud, equity will not grant relief:

There is nothing in this record to suggest any lack of good faith on the part of the board. Overvaluation resulting from error of judgment will not support a claim of discrimination. There must be something that amounts to an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principle of uniformity. *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 62 L. ed. 1154, 38 S. Ct. 495;



*Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 67 L. ed. 340, 43 S. Ct. 190, 28 A.L.R. 979; *Chicago G. W.R. Co. v. Kendall*, 266 U.S. 94, 69 L. ed. 183, 45 S. Ct. 55; *Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239, 245, 76 L. ed. 265, 271, 52 S. Ct. 133; *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23, 28, 76 L. ed. 146, 149, 52 S. Ct. 48. *Id.*, at 111 (emphasis added).

The requirement of purposeful overvaluation with discriminatory intent was the controlling rule for courts of equity prior to the enactment of the Tax Injunction Act, 28 U.S.C. Section 1341. See also, *Chicago, Great Western Ry. v. Kendall*, 266 U.S. 94 (1924) where Justice Taft, in affirming a denial of an injunction in a suit alleging overvaluation of railroad property, stated:

It is not enough, in these cases, that the taxing officials have merely made a mistake. It is not enough that the court, if its judgment were properly invoked, would reach a different conclusion as to the taxes imposed. *There must be clear and affirmative showing that the difference is an intentional discrimination, and one adopted as a practice.* *Id.*, at 98-9 (emphasis added).

and *Chicago, Burlington and Quincy Ry. v. Babcock*, 204 U.S. 585 (1907) where Justice Holmes, after reiterating the general principle of non-interference by a court of equity in the absence of fraud or intentional overvaluation, commented on the railroad's failure to meet its burden of proof:

... it is enough to say that *no scheme or agreement on the part of the county assessors, who taxed the other property, was shown, or on the part of the board of equalization and assessment* . . . *Id.*, at 597 (emphasis added).

Although the BN and the Solicitor General argue that the threshold requirement of purposeful overvaluation with discriminatory intent is nothing more than judicial legislation, the prerequisite in *Lennen* was not established by

the Tenth Circuit but was a tried and true equitable principle rooted in the sound legal thought of this Court.<sup>19</sup> Had Congress intended to remove the jurisdictional threshold which this Court has long recognized as a prerequisite for a court of equity to entertain an action alleging overvaluation, it would have redefined the equitable jurisdiction by enacting a specific directive. The mere lifting of the jurisdictional bar of 28 U.S.C. Section 1341 in Section 306 does not change or eliminate the long standing proof required by a court of equity for maintenance of a suit to enjoin taxes on allegations of overvaluation. The jurisdictional threshold requirement of purposeful overvaluation with discriminatory intent enunciated in *Lennen* recognizes and adheres to the proof required by this Court in actions seeking equitable relief in matters of state taxation.

The BN ignores more than a century of precedent in arguing it may maintain an action seeking injunctive relief for alleged overvaluation based on nothing more than the meretricious opinions of true market value espoused by its appraisers. Nothing in Section 306 or its legislative history supports such an abrupt departure from and enlargement of the traditional principles governing the jurisdiction of a court of equity. The Tenth Circuit in *Lennen* applied well-founded principles of equity when it held that overvaluation actions were not cognizable under Section 306 absent a showing of purposeful over-

19. Although the Solicitor General suggests that the *Lennen* requirement frustrates the purpose of Section 306, the Solicitor General agrees that not every allegation of overvaluation is cognizable in federal court. (U.S. Br. at 24-5) The Solicitor General in its *Lennen* amicus brief claimed that Section 306 applied to overvaluations resulting from an assessment rule or methodology which *systematically* produced excessive values and acknowledged the "outcome under the court of appeals' test and under our proposed standard will be the same." (U.S. *Lennen* Br. at 14-15, f.n. 7) Since the test articulated by the Tenth Circuit is rooted in historical precedents, this Court should not be swayed by the Solicitor General's uncertain threshold requirement.



valuation with discriminatory intent. This Court must apply those same equitable principles and affirm the decision below.

### CONCLUSION

Section 306 of the 4-R Act was enacted to correct discriminatory tax treatment of railroads. Its purpose was not to absolve railroads from ad valorem taxation altogether. The BN has argued that, unless the *Lennen* rule is reversed, the objectives of the 4-R Act will be negated. Neither the legislative history nor the statutory language of Section 306 supports the BN's claim that Congress intended to grant subject matter jurisdiction to the federal district courts to hear their annual woes of alleged overvaluation for ad valorem tax purposes. The statutory construction sought by the BN raises serious doubts regarding Section 306's constitutionality and contravenes a specific directive from Congress that the act be interpreted in a manner to avoid a charge that a nonjudicial function (i.e. valuation) is required to be performed. The BN attacks the *Lennen* jurisdiction threshold as being judicial legislation based upon an arrogant premise that a court of equity under Section 306 must enjoin any act which it claims results in discriminatory taxation.

This Court must refuse the BN's invitation to sit as a super-legislature and enlarge the relief available under Section 306 to include suits based on mere allegations of overvaluation.

Respectfully submitted,

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### APPENDIX A

The following list of references are the Bills, Hearings and Reports of the House and Senate on all of the Section 306-type legislation. The District Court for the District of Kansas, *Burlington N. R.R. v. Lennen*, 573 F. Supp. 1155 (D. Kan. 1982), and the Tenth Circuit reviewed all of the Bills, Hearings, and Reports in reaching their decisions:

H.R. 7497, 87th Cong., 1st Sess. (1961); H.R. 736, 88th Cong., 1st Sess. (1963); H.R. 4972, 89th Cong., 1st Sess. (1965) (together with twelve other identical bills); S. 2988, 89th Cong., 2d Sess. (1966); S. 927, 90th Cong., 1st Sess. (1967); H.R. 1480, 90th Cong., 1st Sess. (1967); S. 2289, 91st Cong., 1st Sess. (1969); H.R. 16245, 91st Cong., 2d Sess. (1970); S. 2841, 92nd Cong., 1st Sess. (1971); S. 3945, 92nd Cong., 2d Sess. (1972); S. 1891, 93rd Cong., 1st Sess. (1973); H.R. 10979, 94th Cong., 1st Sess. (1975); S. 2718, 94th Cong., 1st Sess. (1975).

Hearings and Reports on the above bills are found at the following references:

*Hearing on H.R. 736 and H.R. 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess. (1964);*

*Hearings on H.R. 4972 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong., 2d Sess. (1966);*

*Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce 90th Cong., 1st Sess. (1967);*

*Report of Hearings S. 927 Before Senate Comm. on Commerce, 90th Cong., 2d Sess., Rep. No. 1483. (1968);*

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*Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, 91st Cong., 1st Sess. (1969);*

*Report of Hearings on S. 2289 Before Senate Comm. on Commerce, 91st Cong., 1st Sess., Rep. No. 91-630 (1969);*

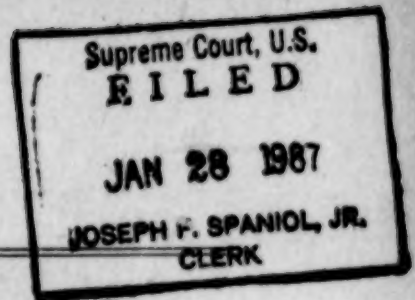
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*Report on 3945 of the Senate Comm. on Commerce, 92nd Cong., 2d Sess., Rep. No. 92-1085 (1972);*

*Report on S. 2718 of the Comm. of Conference, 94th Cong., 2d Sess., Rep. No. 94-595 (1976).*

(14)  
No. 86-337



**In the Supreme Court  
OF THE  
United States**

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Petitioner,*

VS.

OKLAHOMA TAX COMMISSION, *et al.,*  
*Respondents.*

**On Writ of Certiorari to the United States  
Court of Appeals For the Tenth Circuit**

**BRIEF AMICI CURIAE OF FIFTY CALIFORNIA  
COUNTIES IN SUPPORT OF RESPONDENTS**

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## INTEREST OF AMICI CURIAE

*Amici* comprise fifty California counties, each of which collects a property tax on railroad property within its borders. (A list of the *amici* will be found at Appendix "A", *infra*.) Each *amicus* is also a defendant in *Atchison T. & S.F. Ry. v. Board of Equalization*, 795 F.2d 1442 (9th Cir. 1986), in which numerous railroads have pressed valuation claims similar to those advanced by Petitioner in this action.<sup>1</sup> As Defendants in the *Atchison* litigation, *amici* are well-situated to apprise this Court of the difficulties and complexities inherent in overvaluation litigation. See pp. 26-27, *infra*.

If Petitioner's interpretation of the 4-R Act is accepted, a host of specialized and technical valuation issues—which intrude deeply into state tax administration and which involve no questions of federal law—will be litigated in the federal courts. Yet a careful examination of the legislative history of the Act reveals that neither Congress nor its railroad proponents intended to provide a federal forum for such claims. Indeed, Congress was assured by representatives of the railroads that overvaluation of railroad property was simply not a problem that required a federal legislative remedy. Petitioner's proposed interpretation of the Act ignores this legislative history and would effectively substitute the federal courts for state taxing authorities and the state courts. It is to prevent this result—and to avert years of complex and burdensome federal litigation over technical property valuation issues—that this brief *amici curiae* is filed.<sup>2</sup>

<sup>1</sup> The Ninth Circuit ruled in the *Atchison* case that while Section 306 of the 4-R Act (now codified as 49 U.S.C. § 11503) permits a railroad plaintiff to bring a federal lawsuit contending that its property has been overvalued, the abstention doctrine prohibits the district courts from considering such claims in the first instance. Although a petition for rehearing is pending, the Ninth Circuit has formally deferred ruling on the petition until the decision in this case.

<sup>2</sup> Since no party to this case contends that a district court should abstain from considering overvaluation claims under the 4-R Act, this brief does not discuss the abstention issue raised by the Ninth Circuit's decision in *Atchison*. We urge the Court to avoid saying anything in its



## SUMMARY OF ARGUMENT

This case turns on the issue of whether a statute passed to provide the railroads with one form of property tax relief—"equalization relief"—provides them as well with a means of securing "valuation relief." By "equalization relief," we mean lowering the assessed value of a railroad's property so that the ratio between that value and the railroad's true market value (as determined by the appropriate state taxing authorities under state law) is no greater than the comparable ratio between the true market value and the assessed value of "other commercial and industrial property." By "valuation relief," we mean the asserted right of a railroad to challenge in federal court the State's determination of its true market value. These two forms of relief are fundamentally different; indeed, Congress and the railroads themselves distinguished between them in drafting, sponsoring and passing the 4-R Act.<sup>3</sup>

The legislative history of the Act is filled with compelling evidence that state and local governments had discriminated against railroad property by subjecting it to a higher assessment ratio than that applied to property owned by other commercial and industrial users. In passing Section 306, Congress provided equalization relief—by requiring that the assessed values of railroad "transportation property" be reduced, on an across-the-board basis, if necessary to achieve an assessment ratio no greater than the assessment ratio for "other commercial and industrial

decision in this case that would pretermitt further consideration of this question.

<sup>3</sup> The United States as *amicus curiae* uses the term "undervaluation claim" to refer to a request for equalization relief, no doubt in order to bolster its contention that equalization is merely the mirror image of overvaluation. Brief for the United States as *Amicus Curiae* in Support of Petitioner (hereafter "U.S. Br.") 5. While the United States contends that the term "equalization relief" is "confusing" (*id.*), we use the phrase for two reasons: (1) "equalization" has a well-established technical meaning (*see Black's Law Dictionary* 481 (5th ed. 1979)); and (2) terms such as "equalization," and "equalizing assessments" were used throughout the legislative history of the 4-R Act. *See* pp. 12-18, and notes 14, 15, *infra*.

property." Congress also provided the means by which this comparison would be made: a sales assessment ratio study which would yield the percentage factor applied to reduce—to "equalize"—the assessed values of the railroads' properties.<sup>4</sup>

The grievances Petitioner presses in this case—and the relief that it seeks—are profoundly different from the assessment equalization which Congress intended to provide when it passed the 4-R Act. Equalization relief can be afforded without undue disruption of a State's tax collection process by simply performing a sales assessment ratio study and reducing the railroad's tax bill by the appropriate percentage; thus, a federal court may grant equalization relief without intruding into the details of a State's valuation practices. In contrast, a grant of valuation relief would require the federal courts to resolve scores of highly technical challenges to virtually every aspect of a state assessor's valuation methodology. Permitting railroads to challenge their state property tax valuations in federal court would work a radical shift in an area of fundamental importance to state and local governments across the Nation, as well as imposing a new and burdensome task on the federal judiciary.

Given the concerns that such a statute would raise, one would expect that if Congress contemplated so radical a change in the role of the federal judiciary: (1) the statute would say so in unmistakable terms; (2) the legislative history would demonstrate a strong need, perceived by Congress, for federal oversight of the States' valuation of railroad property; and (3) that history would also reflect a genuine appreciation by Congress of the task it was assigning to the federal judiciary. None of these is the case.

This brief will demonstrate four things. *First*, the language of Section 306 does *not* state in unmistakable terms—or, indeed, in *any* terms at all—that federal courts should review state determinations of the true market value of railroad property. To the

<sup>4</sup> For example, in the *Atchison* case, the district court found that "other commercial and industrial property" was assessed at 59.6% of its true market value, and entered a preliminary injunction requiring that railroad property taxes be reduced by 40.4%.

contrary, the language of the statute mandates equalization relief and nothing more. *See* Part I(A), *infra*.

*Second*, Congress was told repeatedly by the railroad proponents of the 4-R Act that the problem which it should remedy was the underassessment of other property in relation to railroad property and the failure of the States to provide relief from such underassessments, *i.e.*, equalization relief. *See* Part I(B)(1), *infra*. Moreover, the Act's supporters also told Congress that inaccurate determination by the States of the true market value of railroad property was simply not a problem. Indeed, Congress was repeatedly assured that the proposed legislation was concerned only with equalization and would not extend to overvaluation claims. *See* Part I(B)(2), *infra*.

*Third*, interpreting the 4-R Act in the manner suggested by Petitioner and its *amici* would impose novel and heavy burdens on the federal courts. In contrast to a claim for equalization relief, an overvaluation claim requires a court to second-guess determinations made by state taxing authorities in a complex, specialized area which necessarily involves the making of individualized judgments. The claims in the *Atchison* case vividly illustrate the difficult and burdensome fact-finding which federal courts would be required to undertake if the 4-R Act is interpreted to provide a federal forum for overvaluation claims. *See* Part II, *infra*.

*Fourth*, doubtless recognizing that Petitioner's interpretation of Section 306 would expose the federal courts to a host of railroad overvaluation suits, the Tenth Circuit and the Solicitor General have each suggested limitations on the availability of federal relief. However, these efforts to limit the burden which Petitioner's interpretation of the 4-R Act undoubtedly would impose on the federal courts find no support in either the statute's language or its legislative history. Instead of adopting either approach, this Court should interpret the 4-R Act in accordance with the contemporaneous understanding of its railroad proponents: to provide a federal remedy for equalization claims, but not for claims based on overvaluation. *See* Part III, *infra*.

## ARGUMENT

### I

#### THE 4-R ACT DOES NOT EMPOWER FEDERAL COURTS TO REDETERMINE THE TRUE MARKET VALUE OF RAILROAD PROPERTY

##### A. The Language Of The Statute Does Not Support Federal Court Jurisdiction To Redetermine The True Market Value Of Railroad Property

Although Petitioner and its *amici* repeatedly assert that the "plain language" of Section 306 requires review of valuation claims (*see, e.g.*, Pet. Br. 16-20; U.S. Br. 13-15), in fact the statute nowhere directs federal courts to entertain such lawsuits. By its terms, the 4-R Act regulates only the determination by a State of the *assessed value* of railroad property, by providing that the ratio of that value to the true market value shall be no greater than the comparable ratio for "other commercial and industrial property." The 4-R Act does not set parameters for the State's determination of true market value—as it does with respect to assessed value—nor does it regulate the means by which railroad property true market value shall be determined. Thus, the plain language of the statute suggests that Congress did not intend to provide for federal review of a State's determination of true market value, as opposed to its derivation of assessed value.

This conclusion is reinforced by subsection 2(e) of Section 306. In that provision, Congress specified the manner in which federal courts should ordinarily determine the ratio between assessed and true market value for "other commercial and industrial property": by means of a sales assessment ratio study. A sales assessment ratio study compares the assessed value to the actual sales price for a representative and statistically valid sample of properties within the assessment jurisdiction which have been sold, to derive the degree to which property has been under- (or over-) assessed. Because railroad property is sold too infrequently to generate statistically reliable sale price data, such a study cannot be used to determine *its* true market value. Thus, the 4-R Act says nothing about the means by which a federal court should determine the true market value of railroad property.



By the time the plaintiff in an equalization case brings a claim in federal court, determinations of the assessed and true market value of its property necessarily will have been made by the State. Yet Congress did not direct the federal courts to redetermine the State's true market valuation of railroad property. Nor did it give any direction as to how such redeterminations would be accomplished. The congressional silence on these important issues stands in sharp contrast to Congress' very specific reference to the use of sales assessment ratio studies for "other commercial and industrial property"—and is strong evidence that Congress simply never intended the federal courts to perform railroad property revaluations under the aegis of the 4-R Act.<sup>5</sup>

Petitioner's "plain language" argument rests entirely upon inferences from the language of the statute, and weak ones at that. It relies on two statutory phrases: (1) the language in Section 306(2)(d) which provides that "[t]he burden of proof with respect to the determination of assessed value and true

<sup>5</sup> Petitioner and the United States as *amicus* attempt to rebut this argument by asserting that while Congress had to prescribe a means of determining the assessment ratio for "non-railroad commercial and industrial property"—because the task of determining true market value for all this property "is a formidable one"—no such legislative direction was necessary for determining the true market value of railroad property. Pet. Br. 19; see also U.S. Br. 14. Since "states commonly value railroad property by the 'unit method' . . . there was . . . little need for Congress to designate in Section 306 permissible methods for calculating the market value of a railroad's holdings in a state." *Id.* at 14-15.

This argument fails because its major premise is simply wrong. Determining the true market value of railroad property is, if anything, more complex and open to debate than equalizing two classes of property by means of a sales assessment ratio study. The facile generalizations regarding the unitary method contained in the briefs of Petitioner and the United States obscure layers of complexity. Within the general rubric of "unitary valuation," States employ a huge variety of methodologies, almost all of which are necessarily subjective. See pp. 25-26, *infra*. Thus, the failure of Congress to give guidance as to how to determine the true market value of railroad property is strong evidence that Congress did not intend to require the courts to make independent redeterminations of the States' conclusions.

market value shall be that declared by the applicable State law"; and (2) the proscription in Section 306(1)(d) forbidding the States from levying other taxes that discriminate against rail carriers. Neither of these snippets from the statute, taken either separately or together, support Petitioner's reading of Section 306.

In the first place, the language in Section 306(2)(d) that refers to burden of proof is hardly conclusive. Under *any* construction of the statute, a railroad plaintiff must prove the true market value of "other commercial and industrial property," which the statute provides shall usually be accomplished by means of a sales assessment ratio study. For this reason, Petitioner's argument that "there would have been no reason for Congress to prescribe a burden of proof" if a federal court could not redetermine railroad property true market value (Pet. Br. 18) is simply incorrect. There is no reason to infer that the language relating to burden of proof in Section 306(2)(d) refers to anything *other* than commercial or industrial property or to believe that by such indirect means Congress meant to authorize the *de novo* redetermination by a federal court of the true market value of railroad property.<sup>6</sup>

<sup>6</sup> This reading of the statute is confirmed by language from the Senate committee report on the bill which Congress finally enacted. There, in the course of describing the judicial review available under the 4-R Act, the committee stated:

"[I]n order for relief to be granted under this section, the transportation property must be assessed at a ratio at least 5 per cent above that applied to all other commercial and industrial property. The burden of proof with respect to the determination of assessed value and true market value is determined by the State law, and where the ratios cannot be established to the satisfaction of the Court through a sales assessment ratio study, the Court is directed to hold certain assessments unlawful." (S. Rep. No. 499, 94th Cong., 1st Sess. 65, reprinted in 1976 U.S. Code Cong. & Admin. News 14, 80)

This description of the judicial relief provision in Section 306 supports two important inferences, neither of which helps Petitioner. First, this language clearly implies that the "ratios" which a federal court must "establish" (*i.e.*, redetermine) under the 4-R Act are only those applicable to "other commercial and industrial property," since they are the only ones that can be ascertained through a sales assessment ratio



Nor is Petitioner aided by the language of Section 306(1)(d), which forbids state and local taxing authorities from imposing "any other tax which results in discriminatory treatment of a common carrier" subject to the Act. This provision plainly does not extend to the property tax, as the Act's structure demonstrates. Section 306(1) defines the four types of acts prohibited by the statute. The first three of these, expressed in subsections (1)(a), (1)(b) and (1)(c), all pertain to discriminatory *property tax* procedures (i.e., discriminatory assessment, collection or rates). Subsection (1)(d) then prohibits *other* discriminatory taxes. This section was plainly intended to reach taxes other than conventional real property taxes.<sup>7</sup> Subsection (1)(d) has no bearing on whether Section 306 provides a federal forum for claims of property tax overvaluation.

Even were the statutory language clearer than it is, this Court should not base its interpretation of Section 306 on the isolated phrases relied on by Petitioner. As the Court has twice recently stated, "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Kelly v. Robinson*, \_\_\_ U.S. \_\_\_, 93 L.Ed.2d 216, 225 (1986) (quoting *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. \_\_\_, 91 L.Ed.2d 174, 188 (1986)). Such concerns are especially relevant in this case, for "determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*,

study or, in the alternative, through the fall-back provision contained in the statute (which by its terms is only applicable to "other commercial and industrial property"). Second, by treating burden of proof together with determination of the assessment ratio through a sales assessment ratio study, the language implies that the provision defining the burden of proof applies only to the determination of the market value and assessed value for "other commercial and industrial property."

<sup>7</sup> *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981) (license or gross receipts taxes); *Ogilvie v. State Bd. of Equalization*, 492 F. Supp. 446, 454 (D.N. Dak. 1980), *aff'd*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981) (*ad valorem* personal property taxes); *Richmond, F. & P. R.R. v. Department of Taxation*, 762 F.2d 375 (4th Cir. 1985) (corporate net income tax).

\_\_\_ U.S. \_\_\_, 92 L.Ed.2d 650, 659 (1986). Indeed, as the Court stressed in *Merrell Dow*, "[i]f the history of the interpretation of judiciary legislation teaches us anything, it teaches the duty to reject treating such statutes as a wooden set of self-sufficient words." *Id.* (quoting *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959)).

Thus, the language of the 4-Act cannot, by itself, be dispositive. To the contrary, like 28 U.S.C. § 1331, the general federal question statute, the 4-R Act's grant of federal jurisdiction must be "construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation." *Romero, supra*, 358 U.S. at 379. As we shall now demonstrate, these factors compel the conclusion that the 4-Act does not provide a federal forum for resolving claims of overvaluation.

## **B. The Legislative History Of The 4-R Act Demonstrates That Congress Intended To Provide For Equalization Relief, But Not To Empower Federal Courts To Redetermine The True Market Value Of Railroad Property**

### **1. The Legislative History Of The Act Demonstrates That It Was Primarily Intended To Remedy Discriminatory Assessment Ratios And Tax Rates Affecting Railroad Property**

In enacting Section 306, Congress sought to prohibit two forms of discriminatory property tax treatment of railroad property, each of which is proscribed by explicit statutory language. *First*, Congress sought to proscribe the long-established practice of assessing railroad property at a higher ratio of its state-determined true market value than was true for other commercial and industrial property. *Second*, Congress attempted to remedy the use by the States of a higher tax rate for railroad property than that applied to the assessed value of comparable property owned by other businesses. The 4-R Act's legislative history demonstrates that these were the only forms of property tax related discrimination proscribed by the Act.

Legislative concern with the States' failure to equalize assessment ratios between railroad and other commercial and industrial

property long predated the passage of the 4-R Act. While Petitioner traces the 4-R Act back to 1961 (Pet. Br. 22), congressional concern over railroad taxation in fact extends back to 1940, when Congress created a Board of Investigation and Research to report, *inter alia*, on "the extent to which taxes are imposed" upon railroad carriers, water carriers and motor carriers. Transportation Act of 1940, Pub. L. No. 76-785, 54 Stat. 898, 953, § 302(a)(3) (1940). In 1944, in response to this congressional mandate, the Board submitted a lengthy analysis of "carrier taxation" to the House of Representatives. The Board found, *inter alia*, that "officials of approximately half the States readily concede that railroads are being overtaxed because of inadequate equalization." Carrier Taxation: House Comm. on Interstate and Foreign Commerce, Letter from the Board of Investigation and Research transmitting a Report on Carrier Taxation, H. Doc. No. 160, 79th Cong., 1st Sess. 124 (1944). Moreover, the States' failure to equalize the assessment ratios for railroad and other property was highlighted by the Board's Report as the railroads' most serious problem. "If we accept the standards of equity set forth in present tax laws, this failure to equalize State and local assessments is probably the most significant of the railroad tax grievances." *Id.* at 125. While these findings did not produce immediate legislative action, they were repeatedly cited in the legislative debates that led to adoption of the 4-R Act.<sup>8</sup>

The "Doyle Report,"<sup>9</sup> issued in 1961, contained similar findings. Although the Report described some of the problems

<sup>8</sup> See, e.g., S. Rep. No. 1483, 90th Cong., 2d Sess. 3 (1968) (hereafter "S. Rep. No. 1483"); *Tax Assessments on Common Carrier Property: Hearings on H.R. 4972 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 12 (1966) (testimony of James N. Ogden on behalf of the Association of American Railroads); *Discriminatory Taxation of Common Carriers: Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 56 (1967) (hereafter "*Hearings on S. 927*") (testimony of Broley E. Travis); S. Rep. No. 630, 91st Cong., 1st Sess. 4 (1969) (hereafter "S. Rep. No. 630").

<sup>9</sup> S. Rep. No. 445, 87th Cong., 1st Sess. (1961) (hereafter "Doyle Report"). The Report, over 700 pages in length, was prepared under the

inherent in valuing railroads,<sup>10</sup> its treatment of railroad tax discrimination focused on equalization, largely at the behest of the railroads themselves. The Report stated that the Association of American Railroads (AAR) had been asked "to submit any pertinent information available on relative tax discrimination in the matter of State and local taxes." Doyle Report at 458. In response, the AAR told General Doyle's committee that while the data it had compiled "showed a number of separate and, in many cases, different types of obvious discrimination against railroads in the matter of State and local taxation, one clear and distinct pattern or plan of discrimination predominated; namely, the studied and deliberate practice of assessing railroad property at a proportion of full value substantially higher than other property subject to the same tax rates." *Id.* at 486. The Doyle Report echoed this conclusion in its own findings. *Id.* at 458. Like the similar finding in the 1944 Board of Inquiry report, the Doyle Report's conclusion that inadequate equalization was widespread was cited throughout the legislative history leading to the passage of the 4-R Act.<sup>11</sup>

direction of Major General John P. Doyle, pursuant to three Senate resolutions passed in the 86th Congress.

<sup>10</sup> For example, the Report noted that state assessors had "sometimes" used historical cost data as a basis for valuing railroad property, as opposed to capitalized earnings or the value of stock and debt, in order to obtain a higher valuation "than current cash value." *Id.* at 456-57. But the Report did not indicate that this practice was widespread, or that it resulted in systematic or pervasive overvaluation of railroad property. To the contrary, the Doyle Report found that central assessments (like those of railroad property) came closer to true market value than the local assessments of other property. *Id.* at 454. That no doubt explains why the drafters of the Doyle Report recommended a federal remedy to provide equalization relief but never suggested that the legislation they proposed—which ultimately became the 4-R Act—would provide federal valuation review.

<sup>11</sup> As Petitioner correctly observes, the Doyle Report was cited frequently throughout the hearings, debates and reports leading to enactment of the 4-R Act. Pet. Br. 23 n.33. But the references cited by Petitioner refer either to discriminatory equalization or tax rates or the amount of discriminatory taxes annually collected from the railroads. To



The Doyle Report's findings with respect to inadequate equalization—and its adoption of the railroad industry's recommendation that anti-discrimination legislation be enacted<sup>12</sup>—set the stage for a fifteen-year long debate over the propriety of federal tax relief for the railroads. During the course of this debate, the railroad proponents of the Act specifically identified inadequate equalization of assessment ratios as the central evil they sought to eradicate. In 1967, for example, James N. Ogden, appearing on behalf of the AAR, informed a Senate subcommittee that because the “critical step” in the assessment process was “to determine how much of the valuation that has been found should be assessed,” the problem facing the railroads was “how to persuade tax assessors to equalize the railroads’ assessment with that of other property in the same taxing district.” *Hearings on S. 927* at 23. Two years later, another witness for the railroads told the same subcommittee that tax discrimination against railroads was “due to the practice of assessing railroad property at percentages of full value much higher than most other property that is subject to the same tax rate.”<sup>13</sup> In light of such statements, which were echoed throughout the Act’s legislative history,<sup>14</sup> it is not

our knowledge, the Doyle Report’s discussion of the *valuation* problems inherent in taxing railroad property—as distinct from its discussion of equalization—was *never* cited during the fifteen years between issuance of the Report and passage of the 4-R Act.

<sup>12</sup> The Doyle Report noted that the anti-discrimination legislation it proposed as an alternative to removing railroad rights-of-way from the tax rolls altogether had been suggested by the Association of American Railroads. Doyle Report at 465.

<sup>13</sup> *State Tax Discrimination Against Interstate Carrier Property: Hearings on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 55 (1968) (statement of Broley E. Travis) (hereafter “*Hearings on S. 2289*”).

<sup>14</sup> See, e.g., *Hearings on S. 927* at 54 (statement of Dr. Harold M. Groves, on behalf of railroads, that most discrimination against railroads arises from “imperfections in the equalization features of property tax laws”); *Hearings on S. 2289* at 62-63 (1969) (statement of Rolf A. Weil on behalf of the railroads that tax discrimination is due to inadequate equalization of centrally assessed property to locally assessed property).

surprising that the Act’s proponents repeatedly described its purpose as equalizing assessments.<sup>15</sup>

Indeed, Congress was explicitly told that the application of discriminatory assessment ratios and differential tax rates were the *only* forms of discrimination it need redress.<sup>16</sup> Thus, in 1969, Philip Lanier, appearing on behalf of the AAR (see *Hearings on S. 2289* at 5), described the evils which the railroads sought to remedy as follows:

“The discrimination, however, of which we complain at the moment, *lies always in two forms*. Most often it is in the application of an equalization ratio to the actual value of the property. This simply means that having computed the actual cash value of the property the assessor will apply a debasing figure to it. This is called the equalization ratio.

“It is often different for railroads than for property generally. To describe it for the record, the property of a railroad is assessed at actual cash value, I should say, that actual cash value would be equalized at 60 percent. Property generally valued at actual cash value would be equalized at say 40 percent.

<sup>15</sup> See, e.g., *Surface Transportation Legislation: Hearings on H.R. 12891 [and related bills] Before the House Comm. on Interstate and Foreign Commerce and the Subcomm. on Transportation and Aeronautics*, 93d Cong., 2d Sess. 347 (1974) (statement of Chairman of ICC that proposed legislation would “equalize assessments and ad valorem rates”); *Railroad Revitalization: Hearings on H.R. 6351 and H.R. 7681 Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 299 (1975) (same).

<sup>16</sup> The Doyle Report had not found that railroad property was subjected to discriminatory tax rates and, accordingly, did not propose to outlaw rate differentials. See Doyle Report at 465. Neither did the early predecessors of Section 306 address this issue. See, e.g., H.R. 736, 88th Cong., 1st Sess. (1963); H.R. 4972, 89th Cong., 1st Sess. (1965). Coverage of discriminatory tax rates was added to the proposed legislation beginning with S. 927 in 1967. Railroad industry spokesmen testified that this form of discrimination occurred “[l]ess often” than did inadequate equalization. *Hearings on S. 2289* at 34.



\* \* \* \* \*

"Less often we find a discrimination in the tax rate itself. This simply means that a higher tax rate will deliberately be applied to a railroad or public utility property than is applied to property generally." (*Id.* at 33-34 (emphasis added))

These descriptions of the evils sought to be remedied by the proposed legislation were not lost on Congress. The two committee reports addressing the predecessors of Section 306 indicate quite clearly that Congress precisely identified the two particular sources of railroad property tax discrimination described by Mr. Lanier—higher assessment ratios and higher tax rates—and intended to proscribe them both. Thus, the committee stated:

"Since local property taxes are calculated by multiplying tax assessments times the tax rates, *discriminatory taxation can arise in two ways*: First, railroad and other carrier transportation property may be assessed at a substantially higher proportion of true market value than the proportion of true market value at which other property is assessed. Second, railroad and other carrier transportation property may be subject to a higher tax rate than the tax rate for the same purpose applied against other taxable property. . . . Either way, a railroad can be forced to pay higher discriminatory taxes than other taxpayers with similar property in the same taxing district." (S. Rep. No. 1483 at 3 (emphasis added))<sup>17</sup>

Thus, the legislative history of the 4-R Act reveals that the railroads came to Congress with a clearly-defined problem: discrimination resulting from the under-assessment of other com-

<sup>17</sup> See also S. Rep. No. 630 at 3. Numerous other descriptions of the Act and its predecessors similarly indicate that it was intended to redress only the imposition of discriminatory assessments and tax rates. See, e.g., *Hearings on H.R. 6351 and H.R. 7681* at 162-63 (statement of Secretary of Transportation Coleman that bill "would prevent discrimination in assessing the property of interstate carriers and in establishing tax rates for such property"); *Surface Transportation Legislation: Hearings on S. 2362 [and related bills] Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 92d Cong., 2d Sess 411-13 (1972).

mercial and industrial property in comparison to their own, and the lack of adequate equalization relief. Indeed, railroad spokesmen told Congress that inadequate equalization, coupled with the less prevalent practice of discriminatory tax rates, were the *only* forms of property tax-related discrimination that it sought to redress. Congress responded by passing a statute which it described in numerous committee reports as addressing these two problems: discriminatory assessment ratios and tax rates.

Of course, the fact that Congress focused exclusively on these two evils would not necessarily restrict the statute's reach, if a broader construction were necessary to effectuate the 4-R Act's purpose. But the legislative history of the Act reveals far more than legislative inattention to the question of valuation. In fact, the Act's proponents informed Congress, first, that overvaluation of railroad property was not a problem that needed federal legislation and, second, that the legislation they sought would not provide a remedy in federal court for overvaluation claims.

## 2. The Legislative History Of The Act Demonstrates That Its Railroad Proponents Explicitly Informed Congress That Overvaluation Of Railroad Property Was Not A Problem That Needed To Be Redressed By Federal Legislation And That The Legislation They Proposed Would Not Afford A Federal Remedy For Overvaluation

The legislative debates leading to adoption of the 4-R Act were not monopolized by representatives of the railroad industry. During Senate and House committee hearings on the predecessors to Section 306, federal government agencies and other witnesses—many of whom spoke in opposition to the proposed legislation—alerted the committees that the bills might be used as a means of challenging state methods of valuing railroad property in federal court, and pointed out that creating such a remedy would burden the federal courts, intrude on state sovereignty, and cause a conflict between federal valuation proceedings and state tax administration.<sup>18</sup>

<sup>18</sup> See, e.g., *Tax Assessments on Common Carrier Property: Hearing on H.R. 736 and H.R. 10169 Before the Subcomm. on Transportation*

Legislators, obviously concerned, asked representatives of the railroads whether the legislation would require or authorize federal court review of state property tax valuations or valuation methodologies.<sup>19</sup> In response to these inquiries, railroad industry spokesmen repeatedly *denied* that the bills would subject state property tax valuations to federal court review and assured the legislature that its only purpose was to ensure that the States assessed rail transportation property at the same percentage of true market value (as determined by the appropriate state agency) as they assessed other comparable property.

The railroads' response on this point had two components. First, their spokesmen assured Congress that the railroads were generally satisfied with the means employed by the States to value their property. In 1964, for example, three years after issuance of the Doyle Report, the AAR's spokesman (James N. Ogden) told a House subcommittee:

"The principal problem in the manner of railroad assessments is *not* one of how to value a railroad. In the hundred year history of railroad taxation, the practice of valuing railroads for tax purposes has reached a substantial degree of refinement. Though not as simple as valuing a one-family dwelling, the method is neither incomprehensible nor even overly complicated. And it should be remembered that no greater effort is required to assess a railroad fairly and reasonably than is required to assess one unfairly and unreasonably. The real problem is to determine how much of the valuation that has been found should be assessed, which, in turn, depends upon how much of the valuation of other

and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess. 2-3 (1964) (hereafter "*Hearing on H.R. 736 and H.R. 10169*"); *id.* at 5; *Hearings on S. 927* at 87.

<sup>19</sup> See, e.g., *Hearings on S. 2289* at 59 (statement of Senator Hansen); *Common and Contract Carrier State Property Tax Discrimination: Hearing on H.R. 16245 [and related bills] Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 138-39 (1970) (hereafter "*Hearing on H.R. 16245*") (statement of Representative Adams). See also S. Rep. No. 1483 at 26 (individual views of Senator Lausche).

property is assessed. In other words, the problem is how to get the tax assessors in the several States to equalize the railroad's assessment with that of other property in the same taxing district." (*Hearing on H.R. 736 and H.R. 10169* at 18-19)

Similarly, Mr. Ogden's successor as spokesman for the AAR, Philip Lanier, told Congress five years later that "[t]he [valuation] formula varies from State to State and we are not dealing with the valuation question. This is not our problem. We speak only of the equalization of the tax rate." *Hearings on S. 2289* at 39.

Second, spokesmen for the railroad industry also told the Congress that since overvaluation was "not our problem," the legislation they sponsored would not provide a federal remedy for it. For example, Representative Adams, during hearings before a House subcommittee, noted that there were important differences between a strip of railroad track running through a town and a strip of lots with houses on them and asked Mr. Lanier what effect the proposed legislation would have on a State's valuation of such properties. Lanier replied:

"On the valuation—*this bill would not deal with valuation being standard. The standards and methods of valuation that any State wishes to use would be totally unaffected by this legislation.* . . .

"[F]or valuation purposes . . . different uses do require different methods of valuation. . . .

"And that is appropriate because it is the way to get at the real value. There is nothing in this legislation—and we have no brief here to alter that—it is *only in the area of equalization of the computed value that this legislation speaks*. That is where our problem is." (*Hearing on H.R. 16245* at 138-39 (emphasis added))

Representative Adams suggested to Lanier that the language of the bills referred both to valuation and assessment. Lanier replied:

"Without regard to this legislation, assuming it is enacted, without regard to it the assessing authority for the railroads puts a value—a fair market value, true market value, the



*words mean the same—on that railroad property and the local assessor in the towns you refer to puts a true market value on the residences. After that is done, this bill would come into play.*" (*Id.* at 139 (emphasis added))

Representative Adams persisted:

"But that help could not—if, for example, vacant property in that area with no buildings on it was assessed at, we will say, 100 by 100 lot, it would be assessed at \$5,000—. . . if your railroad property was assessed at more than that, under this bill—this is what I'm asking you—I think you probably would have an automatic lawsuit that would say the value of a piece of property with two rails on it and no other improvements should not be any higher than either vacant property plus the value of the rails." (*Id.*)

Lanier replied:

"Let us assume that the vacant lot is assessed at \$5,000. That is the fair market value of that lot. Now, in Washington the equalization ratio is 50 percent. . . . so that that vacant lot actually carries a tax on \$2,500. Now let us assume that a portion of the right-of-way of the railroad equivalent in area in that town to the vacant lot carries a value, fair market value *determined by the State assessing authority* of \$20,000, if it is equalized at 50 percent, the tax goes against only \$10,000. *That is all this bill requires, and that is all we ask for.*

"Because we are speaking in terms of *uniformity of the equalization ratio, not uniformity of the result in dollars of value or in dollars of tax, but only that once the fair market value is determined, the equalization ratio will be the same.* And since you would have a 50 percent ratio in each instance, [*i.e., without regard to the correctness of the valuation in each instance*] we would have absolutely no complaint and no grounds for complaint." (*Id.* (emphasis added))

The other participants in the hearings understood the railroad industry's interpretation of the proposed statute and responded accordingly. In 1969, for example, the Multistate Tax Commis-

sion, which had "participated in extensive discussions [with] representatives of the railroad industry . . . for the purpose of seeking areas of agreement," sent a resolution to the Senate subcommittee considering railroad tax legislation which set forth the Commission's understanding that "[i]n view of the stated position of the carriers that they have never supported the bill in the hopes of using it to bring a pure valuation case in the federal courts, the question of true market value of carrier property should not be a subject for federal court action under the bill." *Hearings on S. 2289* at 111 (statement of Multistate Tax Commission).<sup>20</sup> Additional examples are set forth below.<sup>21</sup>

What the railroad proponents of the Act said about its meaning also served as the basis for Congress' own interpretation of the statute. In 1967, for example, the railroads assured Congress that the proposed legislation would not interfere with state valuation practices:

"Let me emphasize that S. 927 does not suggest or require a State to change its assessment standards, assessment practices, or the assessments themselves. It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other. *It is not a standard for determining value; it is a standard to which values that have already been determined*

<sup>20</sup> The same statement was supplied in 1970 to the relevant House committee. *Hearing on H.R. 16245* at 113 (statement of Multistate Tax Commission).

<sup>21</sup> In 1970, the chief counsel of the California State Board of Equalization wrote after hearing testimony from the bill's railroad proponents that "[i]t . . . appeared to me that what the railroads were saying is that they wanted to have discriminatory assessment ratio practices struck down by the federal courts and that it was not their intention to intrude the federal courts into fact adjudication as to the true market value of railroad property and locally assessed property for the purpose of assessing." *Hearing on H.R. 16245* at 93. See also *Hearings on S. 2362* at 1260 (statement of Houston I. Flournoy).



must be compared.” (*Hearings on S. 927* at 29 (emphasis added) (statement of James N. Ogden))<sup>22</sup>

Almost identical language reappeared in the Senate committee report on the same statute. “In order to avoid any question as to the meaning of the phrase ‘true market value’” as used in the statute, the committee included in its report an appendix (“Appendix B”) and specifically stated that the committee intended “by the phrase ‘true market value’ the meaning set forth in [that] appendix.” S. Rep. No. 1483 at 10. Appendix B set forth in no uncertain terms the limited effect which the statute would have on state valuation practices, in language similar to that used by the statute’s railroad proponents:

“S. 927 does not suggest or require a state to change its assessment standards, assessment practices, or the assessments themselves. It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other. It is not a standard for determining value; it is a standard to which values that have already been determined must be compared.” (*Id.* at 22)

Similar language appeared in a Senate report issued two years later. S. Rep. No. 630 at 25-26.<sup>23</sup>

<sup>22</sup> A similar statement was made during the 1964 hearings. See *Hearing on H.R. 736 and H.R. 10169* at 49, 51-52.

<sup>23</sup> The United States tries to minimize the importance of these congressional reports by claiming that Section 306 has a broader impact on state assessment practices than did the earlier proposed legislation. U.S. Br. 17. It first relies on the fact that Section 306(1)(d), unlike the earlier bills, prohibits discrimination based on taxes other than property taxes. *Id.* The United States also points to the elimination from the Senate version of Section 306 of a provision that would have permitted differential classification of property for state tax purposes if the classification was set forth in the state constitution. *Id.* at 21.

Neither fact is even remotely relevant to the weight to be given the committee reports cited in text. Subsection (1)(d), which prohibits the discriminatory application of taxes *other than property taxes*, is simply irrelevant to the issue of what forms of *property tax* discrimination Congress sought to proscribe. See p. 8, *supra*. Moreover, the fact that

The foregoing legislative history demonstrates unequivocally that the railroad proponents of the 4-R Act—who first suggested the legislation to the committee preparing the Doyle Report, who championed it at every hearing during the fifteen years leading to the Act’s passage, and who were the primary beneficiaries of the Act—told Congress on numerous occasions that overvaluation of railroad property by state taxing authorities was not a problem that needed to be redressed by federal legislation. They also told Congress, in a strategic response to allay the concerns of the Act’s opponents, that the legislation they were proposing would not provide for valuation relief. Yet Petitioner and its *amici* now contend that this legislative history should be ignored. We shall discuss why these arguments are in error in the next section.<sup>24</sup>

later versions of Section 306 contained an exception for discrimination prescribed in state constitutions has no bearing on interpreting two committee reports that endorsed statutes that, like the enacted version of Section 306, did *not* contain such an exception.

The plain fact is that the bills endorsed by the Senate reports cited in text are identical in all relevant respects to the legislation which Congress later enacted. Those committee reports are thus strong evidence of congressional intent in passing the 4-R Act. Indeed, even the United States realizes as much, because it describes one of the two Senate reports cited here in text as “a key committee report” only one page prior to its attempt to distinguish the very same document as of “dubious relevance to the law as enacted.” *Compare* U.S. Br. 16 with *id.* at 17.

The United States also attempts to extract a favorable interpretation from the language quoted in text, relying on the phrase that “true market value” is “a standard to which values that have already been determined must be compared.” U.S. Br. 18. But this language came directly from the railroad lobbyists themselves, who expressly advised Congress that the bill would not require federal review of railroad property valuations. See pp. 19-20, *supra*.

<sup>24</sup> The AAR can hardly have forgotten its representations to Congress, particularly inasmuch as its brief *amicus curiae* in this case states that it “participated extensively in the legislative process resulting in the enactment of Section 306. . . .” AAR Motion for Leave to File at 4. Yet its brief altogether fails to mention, let alone to explain away, the statements made to Congress by its spokesmen. One may admire the audacity, but not the candor, of the AAR, which told Congress that

### 3. The Statements Relied On By Petitioner And Its Amici Are Not A Reliable Guide To The 4-R Act's Meaning

Petitioner and its amici offer four reasons why this Court should not be guided by the legislative history described above, each of which we discuss in turn.

1. Petitioner and its amici seize upon statements in the early committee hearings by representatives of two federal agencies expressing concern that the bill could embroil the federal courts in review of state valuations of railroad property. Pet. Br. 23-24; U.S. Br. 15-16. But, as noted above, it was these very expressions of concern which alerted Congress to the potential problems caused by federal valuation review and which prompted committee members to question railroad lobbyists about the scope of the proposed bill. This, in turn, led to their repeated assurances to congressional committees that the bill was only addressed to inadequate equalization, and would not involve the federal courts in determination of rail property values or valuation methodologies. See pp. 16-18, *supra*. Once these assurances were given, no responsible federal official ever again claimed that the proposed legislation would provide relief for railroad property overvaluation.

Later on in the legislative process, the Act's opponents (primarily state taxing officials) similarly contended that the proposed statute would require federal valuation review. See, e.g., Pet. Br. 25 n.38 (citing eight statements). But as the Court has repeatedly made clear, such "statements are entitled to little, if any, weight, since they were made by opponents of the legislation." *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 855 n.15 (1984). The rationale for this rule is simple: "[i]n their zeal to defeat a bill, [its opponents] understandably tend to overstate its reach." *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 639-40 (1967). That is precisely what occurred here, as some state taxing authorities sought to marshal opposition to the legislation by pointing to the

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overvaluation of railroad property was not a problem and that the legislation it sought would not create a federal forum for valuation claims, and now tells this Court precisely the opposite.

danger that providing federal valuation relief would pose to state tax administration.<sup>25</sup>

2. Petitioner and the United States also rely on the fact that although various state taxing officials suggested amendments that would remove the uncertainty they perceived as to whether the proposed legislation would afford federal valuation review of railroad property, no such amendments were enacted by Congress. Pet. Br. 24; U.S. Br. 16. But while the Court should not adopt a statutory interpretation that Congress considered and rejected (*Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 220 (1983)), there was no such "consideration" here, since none of these amendments were ever formally offered by Members of Congress or put to a vote. Such amendments must have been perceived as unnecessary, in light of the railroads' repeated assurances that the Act they sponsored was not intended to provide valuation relief.<sup>26</sup>

3. Petitioner also attacks Respondents' reliance on the statements quoted above from AAR representatives, whom they describe as "two individuals from the private sector," and whose testimony they suggest should "be given virtually no weight." Pet.

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<sup>25</sup> In the entire fifteen-year debate leading to adoption of the 4-R Act, only one railroad witness ever intimated that federal courts would have to review state valuation of railroad property under Section 306. During the hearings on the 1969 version of the bill, Broley E. Travis, a retired California tax assessor, suggested that federal courts would have to review valuation during the course of a Section 306 action. But as Mr. Travis himself qualified his remarks, he was speaking strictly as a technician, not an attorney. *Hearings on S. 2289* at 59. There is no reason to assume that Congress adopted Mr. Travis' views, in the face of contrary testimony from the railroads' official spokesmen during the very same hearings. See p. 17, *supra*; see also *Burlington N. R.R. v. Lennen*, 573 F. Supp. 1155, 1163 (D. Kan. 1982), *aff'd*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984) ("[T]he Senate Committee on Commerce rejected the viewpoint of Mr. Travis").

<sup>26</sup> Cf. *United States v. United Mine Workers*, 330 U.S. 258, 277 (1947) (rejection of amendment limiting the scope of proposed legislation does not indicate congressional intent where the sponsor of the legislation took the position that the amendment was unnecessary).



Br. 25. But the AAR representatives quoted above were not randomly-chosen members of the body politic expressing gratuitous views about legislation they knew nothing about. Instead, as we have shown, the Association of American Railroads (which both Messrs. Ogden and Lanier represented) suggested anti-discrimination legislation to the committee that drafted the Doyle Report, acted as the primary interest group in favor of the Act, and represented over 90% of the Act's primary beneficiaries, the railroads. See *Hearings on S. 927* at 5; see also pp. 12-18, *supra*. The AAR's views were listened to by Congress, acknowledged by the Act's opponents, and incorporated almost verbatim in congressional reports. See pp. 19-20, *supra*. Their statements as to what the Act would and would not accomplish are therefore entitled to great weight.<sup>27</sup>

4. Finally, Petitioner and the United States rely on the inclusion of the word "overvaluation" in a committee report on the House version of the statute. Pet. Br. 26-27; U.S. Br. 20. But this single word—unique in the 4-R Act's legislative history—will not bear the weight that Petitioner and its *amici* place upon it. To begin with, the language quoted by Petitioner and the United States is part of the House report; however, the House version of the statute was not enacted. Moreover, the House report also contained a much longer analysis of Section 306, which simply stated that the statute would proscribe the collection of any tax based either on a discriminatory assessment or a higher tax rate. H.R. Rep. No. 725, 94th Cong., 1st Sess. 77 (1975). This more detailed explanation of the statute contained no language indicating that the bill would provide federal valuation relief. Nor, of course, did the Senate committee report on the Senate version of

<sup>27</sup> A sponsor's interpretation of a bill is an "authoritative guide to the statute's construction." *Rice v. Rehner*, 463 U.S. 713, 728 (1983) (citation omitted). Given the legislative history described above, the railroad industry (and, in particular, its organized trade association, the Association of American Railroads) was certainly the primary "sponsor" of the 4-R Act. Cf. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263, 271-72 (1982) (statutes regulating transportation industry prime examples of "narrow interest group legislation"). Consequently, its pronouncements as to what the statute would mean if adopted should be given great weight.

the bill, which—unlike the House version—was enacted into law. See S. Rep. No. 499, 94th Cong., 1st Sess. 65-66, *reprinted in* 1976 U.S. Code Cong. & Admin. News 14, 79-80. Under these circumstances, the internally inconsistent House report cannot provide a sound basis for discerning the Act's meaning.<sup>28</sup>

For all these reasons, the effort of Petitioner and its *amici* to rewrite the legislative history of the 4-R Act must be rejected.

## II

### SOUND JUDICIAL POLICY AND CONCERNS FOR FEDERALISM WARRANT A NARROW CONSTRUCTION OF THE 4-R ACT

As this Court noted in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, \_\_\_ U.S. \_\_\_, 92 L.Ed.2d 650, 659 (1986), jurisdictional statutes like the 4-R Act must be interpreted not only in light of Congressional intent, but also with due regard for "judicial power[ ] and the federal system." Like the 4-R Act's legislative history, these factors counsel against an expansive interpretation of the Act's jurisdictional provisions.

Petitioner and the United States argue that because railroad property is valued as a unit, railroad appraisal is no complex task and therefore will not burden the federal courts. But the catchphrase "unitary valuation" obscures a host of complex, troublesome and unresolved questions, the resolution of which ultimately depends on the judgment of assessing authorities, and not on the application of a standardized and well-established procedure. Doyle Report at 481. Because railroad property is almost never sold, its value must be derived indirectly from "other primary evidences of value," such as capitalized earnings, market prices of stock and debt, and the original or reproduction cost less depreciation of the railroad's assets. *Id.* at 455. How much weight to give

<sup>28</sup> When two committee reports conflict, this Court follows the report whose language tracks that of the statute. See *Japan Whaling Ass'n v. American Cetacean Soc'y*, \_\_\_ U.S. \_\_\_, 92 L.Ed.2d 166, 182 n.5 (1986). That is true of the Senate report in this case, and the longer analysis of the bill in the House report, but not the House report language relied on by Petitioner.



each of these factors in valuing any individual railroad is a matter of debate and judgment.

Moreover, the determination of each of the potentially applicable indicators of value raises numerous subsidiary questions. In order to use the "capitalized earnings" approach, the assessor must determine the amount of earnings to be capitalized. While deriving this figure is no small task,<sup>29</sup> "[t]he choice of a rate of capitalization is even more difficult . . ." *Id.* at 476. Similarly, the "stock and debt method of appraisal" also raises complex questions. For example, this method requires appraisal of the "total market value" of the liabilities of a railroad, which in turn requires valuation of "all . . . claims against the assets, whether they be funded or unfunded, contingent or fixed, legal or equitable." *Id.* at 477.<sup>30</sup> The relevance of historical cost will vary from railroad to railroad, depending on factors such as "property deterioration . . . and obsolescence . . . which are not easily measurable." *Id.* at 456. Finally, even after an assessor has assigned a "full system value" to the railroad as an operating entity, the value then has to be divided between the various States in which the railroad does business. This task, says the Doyle Report, "is a very difficult practical problem . . . much like placing value on one of a pair of gloves." *Id.* at 481.

The claims made in the *Atchison* litigation, in which *amici* are defendants, establish beyond doubt that valuation litigation involves far more than the simple application of established standards. For example, in connection with the capitalized income approach to valuation, the railroad plaintiffs in *Atchison* have

<sup>29</sup> For example, the Doyle Report states that railway net earnings should be adjusted "to more accurately reflect actual circumstances as, for instance, provision for maintenance for railroads in receivership, or change in management which improves prospects on earnings, or tax accruals which may be distorted by reason of deficiency assessments, or extraordinary losses arising from the retirement of property not fully depreciated on the books." *Id.* at 476.

<sup>30</sup> Using the "stock and debt method" also raises questions concerning the period of time over which security values are to be averaged, and the effect on security prices of general economic conditions, market trends, and business booms and depressions. *Id.* at 478.

challenged the method used by the California State Board of Equalization ("SBE") of determining their income, as well as its selection of an appropriate capitalization rate. In regard to calculating income, the railroads quarrel with the SBE's decision to assume, for purposes of valuation, that they have a limited life rather than a perpetual income stream. They also challenge the SBE's characterization of funds spent on track and equipment replacement; the SBE's methods of estimating their income tax expenses; the method by which the SBE calculates anticipated benefits from rate increases; the SBE's method of determining land reversion values; the SBE's treatment of working capital; and the fact that the SBE factors state income taxes into the determination of enterprise income on a unitary basis rather than state by state.

Equally complex issues are advanced by the *Atchison* plaintiffs with respect to the stock and debt approach to valuing their property. Thus, the railroads have challenged the SBE's inclusion of accumulated deferred income tax credits and gross market value; its use of the "income influence" method in assigning portions of railroad holding company stock value to railroad company equity; and the SBE's choice of indicative stock price. They also challenge the SBE's use of the cost approach to valuation (*see* Doyle Report at 456-57), and seek to overturn various aspects of the SBE's methodology in apportioning the value of their property to the several States in which they operate.

The record in the *Atchison* case thus wholly undermines Petitioner's blithe assurance that valuation litigation under the 4-R Act "is unlikely to create any unusual difficulty for federal courts" because no "special expertise is necessary" to resolve such claims. Pet. Br. 32. To the contrary, the comprehensive critique of state-law valuation methodology that the railroads now say is required by the 4-R Act would be intensely factual and exceedingly complex.<sup>31</sup>

<sup>31</sup> Moreover, the California experience also contradicts the railroads' claims that they cannot get a fair hearing in state court on their overvaluation claims. Litigation has been filed in the California state courts raising most, if not all, of the claims advanced in the *Atchison* case. On December 19, 1985, the California Superior Court issued a

It would also, in the last analysis, substitute the judgment of the federal courts for that of the state taxing authorities. While Petitioner asserts that finding a railroad's true market value involves only a determination of an "objective economic fact[]" (*id.*), the Doyle Report properly recognized that determining the true market value of railroad property ultimately depends on the application of expert judgment.<sup>32</sup> If the interpretation of the 4-R Act advanced by Petitioner is accepted, ultimately the district courts will be required to substitute their inexpert judgment for the specialized skills of state taxing officials. *Amici* urge the Court to reject this interpretation.

### III

#### THE INTERPRETATIONS OF THE 4-R ACT PROPOSED BY THE TENTH CIRCUIT AND THE SOLICITOR GENERAL SHOULD BE REJECTED

No doubt swayed by the enormous burden that entertaining overvaluation claims would impose on the federal courts, both the Tenth Circuit and the Solicitor General have proposed limiting constructions of the 4-R Act. The Tenth Circuit, first in *Burlington N. R.R. v. Lennen*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984), and then in this case, held that a railroad must make a "strong showing of purposeful overvaluation . . . with discriminatory intent" before a 4-R Act claim can be brought. Pet. App. 2a; 715 F.2d at 498. Similarly, the United States, while urging rejection of the Tenth Circuit's test, contends that overvaluation relief is available under the 4-R Act only if a State has "systematically" determined excessive values for railroad property. U.S. Br. 25 n.14. In our judgment, neither approach is correct, for both suffer from the same vice: lack of support in either the 4-R Act's language or its legislative history.

Notice of Intended Decision in favor of the railroad plaintiffs upholding virtually all of their claims of overvaluation.

<sup>32</sup> No "one method, or even combination of methods, can be reduced to a formula for assessment which will always, and for all conditions, give the nearest true value for a carrier system. . . . The valuation methods . . . are only means to inform the assessor in exercising his judgment expertly." Doyle Report at 481.

Neither the language nor the history of the 4-R Act offers the slightest indication that Congress intended to provide federal jurisdiction for some valuation claims, but not for others. Rather, that language and history demonstrate that, as the district court stated in *Lennen*, "[d]iscriminatory valuation of the railroads . . . was not the problem that Congress sought to remedy in the passage of Section 306." *Burlington N. R.R. v. Lennen*, 573 F. Supp. 1155, 1164, (D. Kan. 1982); see *Burlington N. R.R. v. Lennen*, *supra*, 715 F.2d at 497-98 ("[t]he history suggests that equalization, not valuation, relief was intended to be made available for the railroads"). The *Lennen* court's creation of an exception for intentional or retaliatory overvaluation is entirely the result of judicial invention, and should be rejected.

The same is true for the approach of the United States. Its proposed interpretation of the Act is similarly cut from whole cloth, since the sole support offered is a quotation from a previous brief filed by the Solicitor General. U.S. Br. 25 n.14. Moreover, any attempt to apply the United States' proposed construction of the Act would raise numerous practical problems.<sup>33</sup> For these reasons, we urge the Court to reject it.

### CONCLUSION

*Amici* do not deny that the absence of federal jurisdiction to hear valuation claims leaves one respect in which the railroads might still find themselves subject to "unfair" (though not necessarily discriminatory) taxes—assuming, of course, that a state assessing agency has violated its own constitutional and statutory

<sup>33</sup> The United States asserts that federal relief would not be available if a state simply makes "an error in reaching an excessively high value for [railroad] property," but that such relief would be available if the overvaluation results "from an assessment rule or methodology that—either on its face or as applied—systematically determines excessive values for rail property." U.S. Br. 25 n.14. What sort of "errors" fall into which category, however, is by no means clear. There is thus no doubt that adopting the interpretation of the 4-R Act advanced by the United States—which was undoubtedly conceived in an effort to spare federal courts some of the burden of valuation litigation—would result in more federal court lawsuits, rather than fewer.



obligations to determine "true market value" and that the state courts have failed to remedy the violation. The question, however, is whether Congress has directed the federal courts to entertain claims that such has occurred. The language and the legislative history of Section 306 make clear that it has not.

Nor is this the unjust or irrational result that Petitioner and its *amici* bewail. Prior to the 4-R Act, the federal courts had *no* power to intrude into *any* aspect of alleged unfair state taxation of railroads. When Congress finally did act, it tailored the statute to the problems it was told existed: inadequate equalization practices and discriminatory tax rates. To this date, Congress has yet to be told, much less to declare, that there is a problem with overvaluation of railroad property sufficient to warrant federal intrusion in this still more sensitive and difficult-to-administer area of state tax activity. Until Congress ordains otherwise, Petitioner must continue to pursue judicial review of valuation claims before the state administrative and judicial bodies, where they once were required to pursue all their state tax claims. For these reasons, the Court of Appeals' decision should be affirmed, on the ground that the 4-R Act does not provide a federal forum for claims of overvaluation of railroad property.

DATED: January 28, 1987.

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**(Appendix A)**

**LIST OF *AMICI CURIAE***

County of Alameda	County of Riverside
County of Amador	County of Sacramento
County of Butte	County of San Benito
County of Calaveras	County of San Bernardino
County of Colusa	County of San Diego
County of Contra Costa	City and County of San Francisco
County of El Dorado	County of San Joaquin
County of Fresno	County of San Luis Obispo
County of Glenn	County of San Mateo
County of Humboldt	County of Santa Barbara
County of Imperial	County of Santa Cruz
County of Inyo	County of Shasta
County of Kern	County of Sierra
County of Kings	County of Siskiyou
County of Lassen	County of Solano
County of Madera	County of Sonoma
County of Marin	County of Stanislaus
County of Mendocino	County of Sutter
County of Merced	County of Tehama
County of Modoc	County of Trinity
County of Monterey	County of Tulare
County of Napa	County of Ventura
County of Nevada	County of Yolo
County of Orange	County of Yuba
County of Placer	
County of Plumas	

**MOTION FILED**

**APR 8 1986**

**No. 86-337**

(17)

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**IN THE SUPREME COURT OF THE UNITED STATES**

**October Term, 1986**

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**BURLINGTON NORTHERN  
RAILROAD COMPANY,**  
Petitioner,

v.

**OKLAHOMA TAX COMMISSION, et al.**  
Respondents.

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**On Writ of Certiorari to the United  
States Court of Appeals for the  
Tenth Circuit**

---

**MOTION FOR LEAVE TO FILE AND POST-  
ARGUMENT MEMORANDUM**

---

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26/P

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1986

BURLINGTON NORTHERN	)	
RAILROAD COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 86-337
	)	
OKLAHOMA TAX COMMISSION,	)	
et al.,	)	
	)	
Respondents.	)	

**MOTION FOR LEAVE TO FILE POST-ARGUMENT  
MEMORANDUM ON BEHALF OF RESPONDENTS**

The Attorney General of Oklahoma, Robert H. Henry, requests this Court to grant him leave to file a post-argument memorandum in the present case pursuant to Sup.Ct.R. 35.6 for the following reasons:

1. During oral argument in this case the Deputy Solicitor General stated that "only about ten of these [4-R] cases have involved overvaluation claims



of the kind involved here." Tr. of Oral Arg. 27. This statement is not accurate and grossly understates the correct total of such cases.

2. The Attorney General also requests this Court to allow him to point to the portions in the legislative history where the sales assessment ratio study is discussed, a point raised during oral argument.

3. Statements were made in Burlington Northern's Reply Brief which take certain legislative history out of context and the Attorney General requests the right to respond to those statements, which were made for the

first time in the Reply Brief.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1986

BURLINGTON NORTHERN	)	
RAILROAD COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 86-337
	)	
OKLAHOMA TAX COMMISSION,	)	
et al.,	)	
	)	
Respondents.	)	

POST-ARGUMENT MEMORANDUM OF RESPONDENTS  
OKLAHOMA TAX COMMISSION AND OKLAHOMA  
STATE BOARD OF EQUALIZATION

During the oral argument in the present case on March 25, 1987, the Deputy Solicitor General advised this Court that "only about ten of these [4-R] cases have involved overvaluation claims of the kind involved here." Tr. of Oral Arg. 27. A review of the cases in only three states, Kansas, Cali-



fornia, and Oklahoma, shows that this statement is untrue.<sup>1</sup>

With regard to California, the Attorney General's office in that state has advised this office that there are fifteen valuation cases pending. See Southern Pacific Transportation Co. v. State Board of Equalization, No. C 81 4848 DLJ (N.D. Cal.), (fourteen cases were consolidated under this case number by the court's order of November 10, 1983); and ACF Industries, Inc. v. State Board of Equalization, No. C 86 5483

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<sup>1</sup> A survey of some other states shows that valuation cases have also been filed in other parts of the country. See Appendix "A" herein. This is not meant to be a complete list of all valuation cases pending in the United States. The fact that twenty-three states have joined this case as amici also shows the states believe that they will be overwhelmed by valuation lawsuits.

(N.D. Cal.). The South Pacific case includes the case of Atchison, Topeka and Santa Fe Railway v. Board of Equalization, 795 F.2d 1442 (9th Cir. 1986), where a petition for rehearing is pending.

In Kansas, from 1980 until 1984, every railroad in Kansas filed actions under Section 306 every year.<sup>2</sup> In both 1982 and 1983, the lawsuits of six of these railroads included valuation claims. Burlington Northern Railroad v. Lennen, No. 82-1561, reported on appeal at 715 F.2d 494 (10th Cir. 1983), cert. denied, 467 U.S. 1230 (1984); Burlington

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<sup>2</sup> From 1980 until 1982 there were eleven railroads in Kansas. In 1983 another railroad, the Wichita Terminal Railway, was added, bringing the total to twelve. All of these railroads sued Kansas every year from 1980-84 under Section 306.

Northern Railroad v. Duncan, No. 83-4204 (D.Kan. 1983). - The valuation claims ended due to the Tenth Circuit's ruling in Burlington Northern Railroad v. Lennen, 715 F.2d 494 (10th Cir. 1983), cert. denied, 467 U.S. 1230 (1984).

In Oklahoma, two valuation cases were brought by Burlington Northern in 1983 (one for the 1982 tax year and one for the 1983 tax year; Burlington Northern was joined in the one for the 1983 year by three other railroads). Burlington Northern Railroad v. Oklahoma Tax Commission, No. CIV-83-419-R (W.D. Okla. March 3, 1983) (1982 tax year); Burlington Northern Railroad Co., et al. v. Oklahoma Tax Commission, No. 83-2165-R (W.D. Okla. Sept. 6, 1983) (1983 tax year). In 1986 Burlington Northern and four other railroads filed



suit claiming that their property was overvalued. Burlington Northern Railroad, et al. v. Oklahoma Tax Commission, No. CIV-86-2726-W (W.D. Okla. Dec. 16, 1986).

These cases are in addition to valuation cases which have been noted previously in the briefs and the appendix filed in this case. Atchison, Topeka and Santa Fe Railway v. Board of Equalization, 795 F.2d 1142 (9th Cir. 1986); Burlington Northern Railroad v. Bair, 766 F.2d 1222 (8th Cir. 1985); Burlington Northern Railroad v. Department of Revenue, No. C-85-767-T (W.D. Wash. Oct. 25, 1985) (App. 71a); and Union Pacific Railroad v. Department of Revenue, No. 85-2102 LE (D. Or. May 6, 1986) (App. 77a).

The fact that this many cases have been brought alleging overvaluation claims when the law is unsettled makes it clear that if this Court were to hold that valuation claims could be addressed under Section 306, the floodgates of Section 306 litigation would open.

Furthermore, it cannot seriously be contended that valuation claims would gradually be resolved. Every year there are dramatic differences even in what each railroad says its own valuation is. For example, in its complaint filed in the present case, Burlington Northern contended that its full system value was \$1,495,253,000.00 in 1982. (App. 31a). In its complaint filed in the same court three years later, Burlington Northern alleged that its full system value was now "no greater than \$2,677,833,000."

Burlington Northern v. Oklahoma Tax Commission, No. CIV-86-2726-W (W.D. Okla. Dec. 16, 1986). Therefore, in less than four years Burlington Northern's self-valuation increased by over \$1,000,000,000.00.

It is therefore obvious that battles over valuation would continue into the future. As noted during the oral argument, in the present case the State and Burlington Northern have a disagreement of more than \$2,000,000,000.00 over the value of the railroad's property (the State's valuation of \$3,574,921,544.00 to Burlington Northern's claim that its full system value in 1982 was \$1,495,253,000.00).

The order of the district court in the Bair case after remand by the Eighth Circuit demonstrates the complexity



of valuation litigation, and the impossibility that valuation litigation would eventually be minimized. Burlington Northern Railroad v. Bair, No. 83-100-A (S.D. Iowa July 16, 1986) (App. 43a-70a). See also the amicus brief of Fifty California Counties at 25-28.

The State contends that Congress never intended for federal courts to become mired in such an unprincipled fashion in the internal taxing procedures of the states.

Another issue raised during oral argument concerned the sales assessment ratio study, which Section 306(2)(e) endorses as the means to be used in determining the assessment ratio which railroad property is to be equalized with. The State respectfully directs

this Court's attention to S. Rep. No. 1483, 90th Cong., 2d Sess. (1968) 23-24, and S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969) 26-27,<sup>3</sup> where the sales assessment ratio study is explained and endorsed.

A sales assessment ratio study is not a means of determining value. It is nothing more than a comparison of two numbers taken from the assessment roll -- the value of given property as of the lien date (the assessed value), and the value of such property as reported to the assessor when it is subsequently sold (the sales price, which is a reliable indicator of true market value).

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<sup>3</sup> This Senate Report is cited in this Court's opinion in Western Air Lines, Inc. v. Board of Equalization, 107 S.Ct. 1038, 1044 (1987).

Regarding one remaining point, in its Reply Brief Burlington Northern referred for the first time to statements made by Mr. Lanier (the representative of the Association of American Railroads), where he allegedly opposed a proposed amendment in a letter to Senator Hartke. However, a reading of the same letter reveals that Mr. Lanier made the following statement:

I would further remark that it is not realistic to suggest that passage of S. 2289 would subject the state assessing procedure to a judicial review to which it is not now subject. State courts can and do review valuations of property.

State Tax Discrimination Against Inter-  
state Carrier Property: Hearings for  
S. 2289 before the Subcommittee on



Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess. 107 (1969).<sup>4</sup>

Furthermore, Mr. Lanier's earlier testimony during legislative hearings was important because it and similar assurances by Mr. Ogden and Professors Hartman and Sanders of Vanderbilt University were adopted in the two Senate reports referred to above. S. Rep. 1483 at 10-14, 22-24 and S. Rep.

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<sup>4</sup> Review of other remarks of Mr. Lanier mentioned for the first time in Burlington Northern's Reply Brief (at 11-12) reveals that Mr. Lanier was speaking only of equalization and tax rate relief, which was his constant theme throughout all hearings. Surface Transportation Legislation: Hearings on S. 2362, S. 1092, S. 1914, S. 2635, S. 2841, S. 2842, and S. Con. Res. 56 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 92 Cong., 1st Sess. 297-302 (1971-72).

91-630 at 12-13, 25-26.<sup>5</sup> Cf. Kelly v. Robinson, 107 S.Ct. 353, 361, n. 13 (1986).

It is also significant that Senator Magnuson, who was one of the sponsors of the three predecessor bills to Section 306 (S. 2988, S. 927, and S. 2289), remarked:

I want to emphasize that S. 927 is intended to not interfere with the power of a state to assess and collect property taxes so long as common carriers are accorded equal tax treatment with other taxpayers.

Discriminatory Taxation of Common Carriers: Hearing on S. 927 Before the

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<sup>5</sup> Even the Eighth Circuit in the Bair case conceded that "[t]he [Iowa Director of Revenue's] argument is supported somewhat by legislature history indicating Section 306 was not intended to grant relief for overvaluation." 766 F.2d at 1225.

Subcommittee on Surface Transportation  
of the Committee of Commerce, 90th  
Cong., 1st Sess. 75 (1967).

The State again respectfully requests this Court to reject the interpretation of Section 306 urged by the Petitioner, which would cause massive federal court intrusion into their revenue gathering processes in a manner never contemplated by Congress.

Respectfully submitted,

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APPENDIX "A"

Other Valuation Cases  
In Various Federal  
Courts Around The Country  
in Addition to those in  
California, Kansas and Oklahoma

ARIZONA

Southern Pacific Transportation Co. v.  
State of Arizona, Arizona Dept. of  
Revenue, No. CIV-86-1757 PHX RCB (D.  
Ariz.) (1986 tax year)

Atchison, Topeka, and Santa Fe Railway  
v. State of Arizona, et al., No. CIV-86-  
1794 PHX WPC (D. Ariz.) (1985 and 1986  
tax years)

GEORGIA

Southern Railway, et al. v. State Board  
of Equalization, et al., No. 81-695-A  
(N.D. Ga.)

Norfolk Southern, et al. v. State Board  
of Equalization, et al., No. 86-224-A  
(N.D. Ga.)

IOWA

Burlington Northern Railroad v. Bair,  
No. 83-100-A (S.D. Iowa) (tax years 1979  
through 1982), reported on appeal at 766  
F.2d 1222 (8th Cir. 1985)

Burlington Northern Railroad v. Bair,  
No. 84-579-A (S.D. Iowa) (tax years  
1984, 1985, and 1986)

MONTANA

Burlington Northern Railroad, et al. v. Department of Revenue, CV-86-215-BLG-JFB (D. Mont.) (two railroads filed valuation cases for the tax year 1986)

OREGON

Union Pacific Railroad v. Dept. of Revenue, No. 85-2102 LE (D. Or) (1985 tax year)

Burlington Northern Railroad v. Dept. of Revenue, No. 85-2103 LE (D.Or.) (1985 tax year)

Union Pacific Railroad v. Dept. of Revenue, et al., No. 86-4142 (9th Cir.) (this is an appeal of the two previous cases; both railroads appealed the district court's ruling, which was based on abstension)

Southern Pacific Transportation Co. v. Dept. of Revenue, No. 86-70 LE (D. Or.) (1985 tax year)

Union Pacific Railroad v. Dept. of Revenue, No. 86-1063 (D. Or.) (1986 tax year)

Burlington Northern Railroad v. Dept. of Revenue, No. 86-1064 LE (D. Or.) (1986 tax year)

Union Pacific Railroad, et al. v. Dept. of Revenue, No. 87-3554 (9th Cir.) (this is an appeal of the previous two cases;

both railroads appealed the district court's ruling, which was based on abstention)

Southern Pacific v. Dept. of Revenue,  
No. 86-1086 LE (D. Or.) (1986 tax year)

UTAH

Southern Pacific Transportation Co. v.  
State of Utah, et al., Nos. C-84-0840-J  
and C-84-0839-J (D. Utah) (tax years  
1984-1985) (consolidated cases)

WASHINGTON

Burlington Northern Railroad v.  
Washington Department of Revenue, No.  
C-85-767-T (W.D. Wash.) (1985 and 1986  
tax years)

Union Pacific Railroad v. Washington  
Department of Revenue, No. C-86-889-T  
(W.D. Wash.) (1986 tax year)

Trailer Train Co. v. Washington Depart-  
ment of Revenue, No. C-86-78-TB (W.D.  
Wash.)